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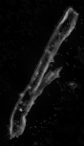

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IN THE

Supreme Court of the United States

October Term, 1969

No. 942

KEVIN L. DONALDSON, f/k/a
MERTON H. SWEET, *Petitioner*

v.

UNITED STATES et al., *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The orders of the district court denying intervention and enforcing the Internal Revenue Summonses (A. 33, 34) are not officially reported. The opinion of the Fifth Circuit Court of Appeals, (A. 42) is reported at 418 F. 2d 1213.

JURISDICTION

The judgment of the United States Court of Appeals was entered on October 30, 1969. (A. 53) Petition for Writ of Certiorari was filed December 11, 1969 and certiorari was granted February 27, 1970. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I

Whether the taxpayer under investigation has a right to intervene in proceedings seeking judicial enforcement of Internal Revenue Summonses issued to third parties.

II

Whether Internal Revenue Summonses issued in a criminal investigation for the primary purpose of obtaining evidence for use in a criminal proceeding are invalid and unenforceable being outside the scope of Section 7602 of the Internal Revenue Code of 1954.

III

Whether an intervening taxpayer is entitled to a full adversary hearing in challenging enforcement of administrative summonses issued by the Internal Revenue Service.

STATUTES INVOLVED

The statutory provisions involved are Section 7602 and Section 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §7602 and §7604(a), Rules 24(a)(2)

and 81(a)(3) Federal Rules of Civil Procedure, which provisions are set forth in the Appendix hereto, pages 47, 48.

STATEMENT

Petitioner, Kevin L. Donaldson, (hereinafter referred to as the Taxpayer), is under investigation by the Internal Revenue Service. (A. 9) Respondent, John P. Grady, is a Special Agent employed in the Intelligence Division of the District Director of Internal Revenue in Tampa, Florida, assisting in the conduct of an investigation of the Taxpayer, for the years 1964 through 1967, inclusive. Respondents, Joseph J. Mercurio and Acme Circus Operating Company, Inc.[1] are third party witnesses to whom the Summonses in question were directed.

Two related actions were commenced by the United States and Special Agent Grady in the United States District Court for the Middle District of Florida to enforce Internal Revenue Service Summonses issued to the third party witnesses, Joseph J. Mercurio and Acme Circus Operating Company, Inc.[2] The Taxpayer sought to intervene in the proceedings and was denied intervention. Thereafter, the District Court ordered the production of documents from and the testimony of the third parties without a hearing. The Taxpayer appealed from these Orders. The United States Court of Appeals for the Fifth Circuit affirmed the District Court Orders

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[1]The Court of Appeals designated these parties as "Two former employers of the taxpayer" (A. 43), a determination which finds no support in the record.

[2]The two Summonses and the proceedings in the District Court being nearly identical, only the Mercurio record has been reproduced in the Appendix.

holding the right to intervene had not been established. A timely Petition for Writ of Certiorari was filed and granted.

The Taxpayer, in September 1968, aware that the Internal Revenue Service contemplated issuing summonses to Joseph J. Mercurio and Acme Circus Operating Company, Inc. moved the United States District Court, Middle District of Florida, Tampa and Jacksonville Divisions, for a Preliminary Injunction and Temporary Restraining Order, temporarily enjoining and restraining Mercurio and Acme, respectively, from complying with any summons which may be issued subsequently until such time as an order of a court of competent jurisdiction had been issued requiring such compliance. The District Courts found that immediate compliance with the requests made by the Internal Revenue Service appeared to threaten a violation of the Taxpayer's constitutional rights and cause immediate and irreparable injury, loss or damage. Whereupon, the Courts granted a Preliminary Injunction and a Temporary Restraining Order. (A. 27)

Pursuant to the Preliminary Injunction and Temporary Restraining Order, Mercurio and Acme, respectively, refrained from complying with the Summonses issued to them by Special Agent John P. Grady. (A. 4)

On November 25, 1968, two Petitions were filed in the United States District Court for the Middle District of Florida, Tampa Division, by the United States of America and John P. Grady, Special Agent, to enforce the Internal Revenue Summonses issued to Mercurio and Acme. Enforcement of the Summonses was sought pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954. (A. 3)

Each Petition alleged that Special Agent John P. Grady, was assisting in an investigation being conducted by Special Agent Bruce B. Miller, New Orleans, Louisiana, for the purpose of ascertaining the correct income tax liability of the Taxpayer, for the years 1964 through 1967, inclusive, and annexed Affidavits of the Special Agents. (A. 4, 6, 12)

The two Summonses in question required Mercurio and Acme to appear and give testimony concerning the alleged tax liability of the Taxpayer; to produce for inspection the books and records of Acme Circus Operating Company, Inc. d/b/a Clyde Beatty-Cole Bros. Circus relating to employment, compensation and expense reimbursement or other financial transactions with the Taxpayer for the years 1964 through 1967, inclusive. (A. 9)

On November 29, 1968, the District Court issued Orders to Show Cause directing Mercurio and Acme to appear on December 20, 1968, and to show cause why they should not be compelled to comply with the Internal Revenue Summonses. It was further ordered that the Respondents, Mercurio and Acme and *any other interested person shall file a written response to said petition within ten (10) days after service of said petition and attached exhibits.*[3] (A. 16)

On December 9, 1968, the Taxpayer filed Motions to Intervene and Answers in each of the enforcement proceedings, under Rule 24(a)(2) of the Federal Rules of Civil Procedure, admitting or denying various allegations of the Petitions and setting forth good faith affirmative defenses to enforcement. (A. 17, 19)

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[3]The Taxpayer was formally served with copies of the Petitions. (A. 5)

In his Motion to Intervene, Taxpayer alleged that it was his tax liability that was in issue in the proceedings; that his interest would not be adequately protected by the respective Respondents, Mercurio and Acme; and, that a judgment of the District Court may adversely and prejudicially affect the rights and privileges secured him by the Constitution of the United States. (A. 17)

In each Answer, Taxpayer alleged that he was the subject of a criminal investigation through which evidence was being procured for criminal prosecution and the administrative Summons issued by the Internal Revenue Service was improper, being without the scope of Section 7602 of the Internal Revenue Code of 1954. (A. 21)

The Answers of Mercurio and Acme, filed on December 9, 1968 and December 13, 1968, respectively, admitted the essential allegations of the Petitions and alleged that were it not for the Preliminary Injunction and Temporary Restraining Order they would have complied with the Summonses. (A. 25)

The United States filed an Opposition to the Intervention Motions alleging that the Taxpayer had no legal, equitable, possessory or other interest in the summoned records and therefore had no standing to object to the enforcement since intervention would afford him no relief. Further alleging, that the Taxpayer would not be bound by any judgment rendered, and the issues sought to be raised in the enforcement proceeding were properly the subject of another cause at another time. Finally, that "intervention would unduly delay and encumber the expeditious adjudication of the rights of the original parties." (A. 31)

The District Court on January 16, 1969, denied Taxpayer's Motions to Intervene and ordered enforcement of the Summonses, upon consideration of the pleadings, memoranda of the parties and argument of counsel, but without benefit of any testimony. (A. 33, 34)

The Court of Appeals affirmed the District Court Orders. The Fifth Circuit held the right to intervene had not been established, concluding the Taxpayer alleged no interest which warranted the trial court's refusal to enforce the Summonses. (A. 52) The Opinion seemingly holds that Intervention in summons enforcement actions is limited to factual situations where a taxpayer alleges a legal or equitable claim to the records sought, a proprietary interest or privileged relationship. (A. 44, 46)

SUMMARY OF ARGUMENT

I

Taxpayer, asserting that Summonses issued by the Internal Revenue Service to third party witnesses were outside the scope of statutory authority and that compliance would violate his constitutional rights, enjoined the third party witnesses' voluntary compliance pending full judicial review.

The Internal Revenue Code authorizes the issuance and enforcement of administrative summonses in aid of a determination or collection of a civil tax liability. Likewise, certain other statutory provisions afford persons summoned and interested parties, as the Taxpayer, a full opportunity to challenge the validity of summonses and to assert their rights and claims.

The Taxpayer's intervention in the enforcement proceedings is by virtue of Rule 24(a)(2) Federal Rules of Civil Procedure. Under the Federal Rules an individual may intervene, as a matter of right, when disposition of the pending action, in which he has an interest, will impede his ability to protect his interest unless adequately represented by existing parties.

Considering that it was Taxpayer's rights, as the real party in interest, which were at issue in the District Court, and that Mercurio and Acme were "nominal parties" unconcerned with the ultimate disposition of the action, Taxpayer was entitled to intervention under Rule 24(a)(2) Federal Rules of Civil Procedure.

Judicial decisions in various circuits had limited the objections that could be asserted by summoned parties or intervening taxpayers. This Court eliminated the distinction between the parties summoned and those affected by a disclosure, as the Taxpayer, assuring both the opportunity to appear or intervene in actions seeking judicial enforcement and to challenge the summons by asserting constitutional or other claims. *Reisman v. Caplin,* 375 U.S. 440 (1964).

The Commissioner of Internal Revenue having invoked the court's process to enforce an administrative summons must meet certain standards to obtain judicial enforcement. He must show that the investigation has a legitimate purpose, his inquiries relevant, the information sought not within his possession and that the administrative steps required by the Internal Revenue Code have been followed. *United States v. Powell,* 379 U.S. 48 (1964).

The court below, contrary to both *Reisman v. Caplin,* 375 U.S. 440 (1964) and *United States v. Powell,* 379

U.S. 48 (1964), limited intervention to proceedings seeking production of documents belonging to a taxpayer, the work product of his attorney, or documents in which the taxpayer claimed some proprietary interest, or evidentiary claim of privilege. To accord such an interpretation to *Reisman* and *Powell,* would render futile this Court's clear and careful delineation of "other appropriate grounds" upon which the enforcement of a summons may be challenged.

II

Although discussion of the substantive issue of the "improper purpose" of a summons is not ripe for adjudication, since the District Court did not conduct an evidentiary hearing, the Court of Appeals denied intervention finding no "improper purpose" existed to warrant the trial court's refusal to enforce the Summonses. In light of the decision of the court below, consideration must be given to the meaning of this Court's language in *Reisman v. Caplin,* 375 U.S. 440 (1964) and reference to the right of judicial review of an administrative summons issued for an "improper purpose" authorized by *United States v. Powell,* 379 U.S. 48, 58 (1964).

Section 7602 of the Internal Revenue Code of 1954 expressly enumerates the purposes for which the Internal Revenue Service is authorized to issue a summons in connection with the Revenue Laws of the United States.

The United States has consistently asserted that Section 7602 contains no limitations and authorizes the determination of tax liabilities by Agents of the Treasury, whatever the purpose and whatever the ultimate outcome. Reported court decisions are not in accord, but hold that whether a summons is enforceable depends

upon the particular factual pattern established and the nature and manner of investigation upon which the Service has embarked and pursued.

It is essential to distinguish a civil tax case, fraught with suspicion of fraud, and a situation where a full-fledged criminal investigation is being pursued. Where the primary purpose for which a summons is issued, is in conjunction with an inquiry with dominant criminal overtones and no longer solely a civil investigation, an administrative summons is void and unenforceable.

Although this Court has never passed on the question, it is submitted that, when an investigation conducted by Internal Revenue Service Agents has turned from the investigatory stage to one accusatory in nature, the use of administrative summonses under Section 7602 is clearly without the scope of Congressional intent.

III

The District Court in summarily dismissing Taxpayer's Motion to Intervene concomitantly: denied him the right to an evidentiary hearing compelling the Government to show the legitimate purpose of the Summonses and the necessity of the records and testimony sought; determined that such records and information were not already in the Government's possession; and, denied the right to cross-examine government witnesses, elicit testmony and seek production of documentary evidence on the issues which were properly before the court.

Aware that the Internal Revenue Service contemplated issuing summonses to Respondents Mercurio and Acme and having been advised of Respondents' intention to voluntarily comply with such requests, Taxpayer obtained Orders restraining their compliance until such time as a further order of a court of competent jurisdiction was issued. Full judicial review, inherent in the courts' restraining orders contemplated a hearing which would exhaust all issues submitted or which were a proper subject for submission to the court.

In the case at bar where the District Court has neither taken testimony, nor, permitted Taxpayer to submit evidence in an effort to refute the Government's *prima facie* case made in its pleadings and affidavits, there has been no adversary proceeding as required by *United States v. Powell,* 379 U.S. 48 (1964).

ARGUMENT

I

A TAXPAYER UNDER INVESTIGATION HAS A RIGHT TO INTERVENE IN PROCEEDINGS SEEKING JUDICIAL ENFORCEMENT OF INTERNAL REVENUE SUMMONSES TO THIRD PARTIES

In *Reisman v. Caplin,* 375 U.S. 440 (1964), where the petitioners sued to enjoin enforcement of a summons issued to an accounting firm engaged by them, the Solicitor General devoted special attention to the importance of raising objections to a summons initially at the administrative level[4], and, also tendered an alternative procedure where voluntary disclosure would seem imminent:

> There remains the possibility that Peat-Marwick might voluntarily turn the papers over to the Commissioner instead of waiting for the return day, when both petitioners and Bromley would have a chance to be heard. * * * [*E*]*ither petitioners or Bromley are free to bring an action against Peat-Marwick to compel Peat-Marwick to respect any rights the complainants have in the papers, subject only to Peat-Marwick's duty to comply with any valid court order enforcing the Commissioner's summonses.* That would bar voluntary surrender and

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[4](Brief for the Respondent Caplin, p. 8, *Reisman v. Caplin,* 375 U.S. 440 (1964) Sup. Ct. No. 119, Oct. Term 1963.):

> "* * * Under orderly procedures established by Code, persons summoned and interested third parties may raise objections to the validity of the summonses and assert their constitutional rights in administrative proceedings before a Special Agent."

> *force a proceeding under the Code in which petitioners and Bromley could intervene and assert their respective rights.* (Brief for the Respondent Caplin, p. 29, *Reisman v. Caplin,* 375 U.S. 440 (1964) Sup. Ct. No. 119, Oct. Term 1963.) [Emphasis supplied]

In the case at bar, the Taxpayer followed the procedure adopted in *Reisman v. Caplin,* as recommended by the Solicitor General. (Facts p. 4, herein)

A. Taxpayers Are Entitled To Intervention In Summons Enforcement Proceedings Pursuant to Federal Rules of Civil Procedure 24(a)(2).

The application of Rule 24, Federal Rules of Civil Procedure, in summons enforcement proceedings is not disputed.[5] This Court has determined the general applicability of the Federal Rules of Civil Procedure in enforcement proceedings. *United States v. Powell,* 379 U.S 48, 58 (1964) Footnote 18:

> Because §7604(a) contains no provisions specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, *Martin v. Chandis Securities Co.,* 9

[5]The United States on brief in *Reisman v. Caplin,* 375 U.S. 440 (1964), [Brief for the Respondent Caplin, p. 16, *Reisman v. Caplin,* Sup. Ct. No. 119, Oct. Term 1963.] conceded:

> "• • • Interested third parties may also appear and assert their rights to nondisclosure of documents or information.[2]"

[2]*Foster v. United States,* 265 F. 2d 183, 185 (C.A. 2), certiorari denied, 360 U.S. 912; *In re Albert Lindley Lee Memorial Hospital,* 209 F. 2d 122, 123 (C.A. 2), certiorari denied sub non. *Cincotta v. United States,* 347 U.S. 960; *Corbin Deposit Bank of Corbin v. United States,* 244 F. 2d 177 (C.A. 6); *In re Magnus, Mabee & Reynard, Inc.,* 311 F. 2d 12, 18 (C.A. 2) (concurring opinion), certiorari denied 370 U.S. 918; *Rule 24, Federal Rules of Civil Procedure.* (Emphasis Supplied)

> Cir., 128 F. 2d 731. The proceedings are instituted by filing a complaint, followed by answer and hearing. * * *

Rule 24(a), which permits intervention as of right, was amended in 1966, and now imposes on the party opposing intervention the burden of showing the adequacy of the representation by the existing parties.[6]

In the case at bar, the existing parties, Mercurio and Acme, have no interest in the outcome of the litigation. Their Answers except for pleading lack of knowledge concerning the association of Special Agents Grady and Miller in an investigation of Taxpayer's tax liability, admitted the allegations of the Petition and reconfirmed their willingness to voluntarily comply with the Summonses, absent the orders restraining them. (A. 25) Mercurio and Acme are not active parties in the present review by this Court.[7] Upon the record, the United States has failed to sustain the burden of showing the

---

[6] *Nuesse v. Camp*, 385 F. 2d 694, 702 (C.A. D.C. 1967):

> "The Commissioner's right to intervene as a party depends also on whether his interest is adequately represented by existing parties. See generally Annot., 84 A.L.R. 2d 1412 (1962). The prior text of Rule 24 spoke in terms of whether representation by existing parties 'is or may be inadequate'. The present rule provides for intervention 'unless the applicant's interest is adequately represented by existing parties.'
>
> "While the change in wording does not relate to any change in standard as such, *it underscores both the burden of those opposing intervention to show the adequacy of the existing representation and the need for a liberal application in favor of permitting intervention.*" (Emphasis Supplied)

[7] Through their counsel, the Clerk of this Court was advised under date of December 30, 1969:

> "As Joseph J. Mercurio and Acme Circus Operating Company, Inc., both stand ready to follow the orders of the court, and are nominal parties only, no appearance will be filed on behalf of either party in the United States Supreme Court."

adequacy of Taxpayer's representation by existing parties.

Recent decisions interpreting the effect of the 1966 amendments to Rule 24(a) of the Federal Rules of Civil Procedure considered the "required interest" necessary to warrant intervention. The Court of Appeals for the District of Columbia Circuit in *Nuesse v. Camp,* 385 F. 2d 694, 700 (C.A. D.C. 1967) promulgated the following guidelines:

> * * * We know of no concise yet comprehensive definition of what constitutes a litigable 'interest' for purposes of standing and intervention under Rule 24(a). One court has recently reverted to the narrow formulation that 'interest' means 'a specific legal or equitable interest in the chose'. *Toles v. United States,* 371 F. 2d 784 (10th Cir. 1967). We think a more instructive approach is to let our construction be guided by the policies behind the 'interest' requirement. We know from the recent amendments to the civil rules that in the intervention area the 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process. * * *

Similarly, cognizant of the significance of the 1966 Amendments, the Court of Appeals for the Fifth Circuit re-examined the application of Rule 24, as amended, in *Atlantis Development Corporation v. United States,* 379 F. 2d 818, (C.A. 5, 1967) and reversed the order denying intervention.[8]

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[8]The court in *Atlantis* observed at page 829:

> "* * * [I]t is 'as a practical matter' a certainty that an absent party seeking a right to enter the fray to advance his interest against all or some of the parties as to matters upon which he is for all practical purposes shortly to be foreclosed knows the disposition in his absence will 'impair or impede his ability to protect that interest, * * *.' F.R. Civ. P. 24(a)(2). * * *"

During the forepart of September 1968, the Respondents Mercurio and Acme were and remain enjoined and restrained from complying with any summons issued by the Internal Revenue Service. (A. 27) At that time Taxpayer clearly demonstrated to the District Courts that immediate irreparable damage, loss and injury would result to him; that Mercurio and Acme could not adequately represent his interests; and, that he would be bound subsequently by the acts of the Respondents. (A. 27)[9] It is inconceivable, as well as illogical, to suppose that Taxpayer's interests, and, adequacy of representation, which formulate the issues of this case, have been either lost or resolved. To the contrary they remain of the same consequential nature to him as when the restraining orders were issued.

Equally perplexing in light of the Government's strenuous efforts to preclude Taxpayer's intervention is the United States' formal service of their Petitions to Enforce Internal Revenue Summons and attached Orders to Show Cause upon Taxpayer's attorney (A. 5) considering that the District Court's order by its terms was only directed to the Respondents and *any other interested person*. (A. 16)

It is submitted that Taxpayer has a definite, vital and certain interest in the records sought. Such records, as

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[9]Although the United States was not made a party, it was informed of the District Court action. The attitude of the Government was expressed in a letter to another District Court:

> It is our position that this matter is governed by the principle enunciated in *Reisman, et al. v. Caplin, et al.*, . . .
>
> [T]herefore, . . . there is no jurisdiction over the United States or any of its agents in this action, nor could there be unless and until the Government seeks judicial enforcement of the summonses.

Meldman, *Taxpayers Efforts to Restrain Third Party Witnesses' Compliance With a Summons*, 46 TAXES, November 1968, p. 685, 687.

is every case of this type, allegedly reflect financial dealings between a taxpayer and the person summoned as they relate to an alleged tax liability. Therefore, intervention in this matter should be ordered so that Taxpayer's challenges may be heard and determined by the trial court.

B. *Under The Doctrine of Reisman v. Caplin, 375 U.S. 440, Taxpayers May Intervene In Summons Enforcement Proceedings.*

This Court, in *Reisman v. Caplin,* 375 U.S. 440 (1964), determined the rights of Internal Revenue Service Agents to enforce administrative summonses issued under Section 7602 of the Internal Revenue Code of 1954, and the concomitant rights of witnesses, third parties, taxpayers, and other parties affected. Prior judicial decisions in various circuits had limited the types of objections that could be asserted by third parties summoned or intervening taxpayers.[10] The *Reisman* decision eliminated these distinctions by expressly providing that:

> * * * [B]oth parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. (375 U.S. at 445)

The Court of Appeals in denying Taxpayer intervention seemingly concluded that this Court's decision in *Reisman* must be confined to factual patterns where the taxpayer has established a legal or equitable claim to

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[10] *Foster v. United States,* 265 F. 2d 183 (C.A. 2, 1959), cert. den. 360 U.S. 912 (1959); *Hubner v. Tucker,* 245 F. 2d 35 (C.A. 9, 1957); *DeMasters v. Arend,* 313 F. 2d 79 (C.A. 9, 1963); *In re Magnus Mabee & Reynard, Inc.,* 311 F. 2d 12 (C.A. 2, 1962), cert. den. 373 U.S. 902 (1963).

the records sought by way of a proprietary interest or privileged relationship. (A. 44, 46) This is not a proper construction of the Court's decision in *Reisman v. Caplin,* 375 U.S. 440 (1964) and is in direct conflict with the Courts of Appeal for the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969) for the Third Circuit in *United States v. Bank of Commerce,* 405 F. 2d 931 (C.A. 3, 1969) and for the Sixth Circuit in *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966).

In *Reisman v. Caplin,* 375 U.S. 440 (1964) petitioners, attorneys on behalf of certain taxpayers, sought declaratory and injunctive relief against the Commissioner of Internal Revenue with respect to Internal Revenue Service summonses that had been served on an accounting firm relative to the taxpayer's alleged tax liability. In sustaining the lower court's denial of this *independent relief,* this Court noted that complete relief could be afforded the taxpayers when the Internal Revenue Service sought to enforce summonses pursuant to those sections of the Internal Revenue Code invoked by Taxpayer in the instant case.

Specifically holding that a taxpayer could intervene to protect his interest when the Government attempted to enforce a summons against a third person this Court stated: (375 U.S. at 445)

> * * * This Court has never passed upon the rights of a party summoned to appear before a hearing officer under §7602. However, the Government concedes that a *witness or any interested party may attack the summons before the hearing officer.* There are cases among the circuits which hold that *both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. In re Albert Lindley Lee*

Memorial Hospital, 209 F. 2d 122 (C.A. 2d Cir.); *Falsone v. United States,* 205 F. 2d 734 (C.A. 5th Cir.); and *Corbin Deposit Bank of Corbin, Ky. v. United States,* 244 F. 2d 177 (C.A. 6th Cir.) * * * [Emphasis Supplied]

1. *Reisman does not suggest that the categories of "any interested party" or "those affected by a disclosure" are limited to persons having a proprietary interest in the records summoned.*

On the contrary, expressions of agreement with the decisions in *In re Albert Lindley Lee Memorial Hospital,* 209 F. 2d 122 (C.A. 2, 1953) cert. den. sub. non. *Cincotta v. United States,* 347 U.S. 960 (1954) and *Corbin Deposit Bank v. United States,* 244 F. 2d 177 (C.A. 6, 1957) demonstrate that no such interest is required. In *Lindley Lee Memorial Hospital,* the taxpayer, a doctor, was granted leave to intervene in the proceedings brought in the District Court to enforce an Internal Revenue Summons for a *hospital's records,* showing the names and addresses of the doctor-taxpayer's patients. The records belonged to the hospital, not the doctor; similarly, the records in the instant case belong to Acme Circus Operating Company, Inc., rather than to Taxpayer.

Although the doctor-taxpayer contended that the hospital's compliance would violate the privileged communications between physician and patient, the Court of Appeals rejected this contention. Under New York law, should it be applicable, the disclosure by the hospital of the names and addresses of the doctor-taxpayer's patients was obviously not privileged information. The Court,

however, determined that Federal law must be controlling and affirmed the District Court decision[11].

To assume that a naked assertion of privilege by a taxpayer in third party enforcement actions creates additional rights or standing to intervene would make shambles of judicial proceedings.

In *Corbin Deposit Bank v. United States,* 244 F. 2d 177 (C.A. 6, 1957), an Internal Revenue Summons was issued seeking the bank records of a taxpayer's transactions. The taxpayer contended that he had previously been examined by the Service and that under Section 7605 of the Internal Revenue Code of 1954, the Internal Revenue Service must establish reasonable grounds for a suspicion of fraud. Irrespective of the present merits of the taxpayer's allegation, in *Corbin Deposit Bank,*[12] a lack of proprietary interest in the bank records did not prevent that taxpayer from asserting and obtaining judicial review of his challenges.

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[11]*In re Albert Lindley Lee Memorial Hospital,* 209 F. 2d 122, 123 (C.A. 2, 1953) cert. den. sub. non. *Cincotta v. United States,* 347 U.S. 960 (1954):

> "* * * In a careful and able opinion * * * Judge Brennan decided the case on the basis of New York law. He concluded that the state decisions permit a doctor to testify to the fact that he attended a patient professionally, although the statute forbids disclosure of the nature of the patient's illness;[1] and *a fortiori* a hospital should be permitted to testify as to its admission of a patient and who was the patient's doctor.[2] (Footnotes omitted)
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> * * *
>
> "If we thought New York law controlling, we should have nothing to add to Judge Brennan's opinion since we are satisfied that he has correctly analyzed the state cases. But determination of what evidence is admissible in an income tax investigation authorized by 26 U.S.C.A. §3614(a) is a matter to be decided according to federal law. * * *"

[12]See *United States v. Powell,* 379 U.S. 48 (1964).

The Court below has introduced heretofore non-existent ambiguities and equivocation into *Reisman v. Caplin,* 375 U.S. 440 (1964), founded solely upon an interpretation of the cases which this Court considered in arriving at its decision. Taxpayer advances this proposition in accord with the logical interpretation of *Reisman* which numerous recognized members of the profession have accorded it in published articles.[13] In the later case of *United States v. Powell,* 379 U.S. 48 (1964), also involving the enforcement of an Internal Revenue Summons, this Court further delineated what the Commissioner must show in order to enforce the summons, and what the taxpayer may show in order to attack the summons.

Taken together, *Reisman v. Caplin* and *United States v. Powell,* established that a taxpayer, directly when the summons is issued to him, or through intervention when the summons is issued upon a third party, may challenge the summons when judicial enforcement is sought on grounds such as those alleged by Taxpayer: (1) that a constitutional right of the taxpayer is being infringed, (2) that the material is sought for the improper purpose of obtaining evidence in a criminal investigation, and (3) that the summons had been issued to harass the taxpayer, put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the investigation.

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[13]See Mahon, *Limitations Upon the Commissioner: Power to Audit; to Summon; to Assess; Remedies Available to the Taxpayer,* 24 Institute on Federal Taxation 1 (1966); Bender, *The Implications of Reisman v. Caplin In Fraud Cases,* 23 Institute on Federal Taxation, 1293 (1965).

2. *Although a conflict exists among the Circuits in construing Reisman and Powell, it is submitted that the better reasoned view is that adopted by the Third, Sixth and Seventh Circuit Courts of Appeal.*

United States v. Bank of Commerce, 405 F. 2d 931 (C.A. 3, 1969), and *Justice v. United States,* 365 F. 2d 312 (C.A. 6, 1966) involved the enforcement of summonses issued to banks. The courts in these cases experienced no problem in allowing intervention to the taxpayer although he may not have had a proprietary interest in the documents demanded. The taxpayer did have a definite interest in the records sought since they contained his dealings with persons summoned, and reflected on his alleged tax liabilities. Cf. *Application of Cole,* 342 F. 2d 5, 7-8 (C.A. 2, 1965), cert. den. 381 U.S. 950 (1964), where the *sole* question presented was whether the Internal Revenue Service, when it issues a summons to a third person under Section 7602, is required to give the taxpayer notice of the issuance.

Discussing a taxpayer's intervention in summons enforcement proceedings, the Court of Appeals in *Justice v. United States,* 365 F. 2d 312, 314 (C.A. 6, 1966) adopted the guidelines established in *Reisman v. Caplin,* 375 U.S. 440 (1964) and further commented:

> Upon consideration of the motion of the taxpayers to intervene, the Court finds these proceedings under Section 7604(b) are properly before the Court. The questions raised as to the Taxpayers' constitutional rights and their *rights and privileges under the various revenue statutes* must be heard and determined by the District Court under the Federal Rules of Civil Procedure. See Rules 24 and 81(a)(3).
>
> The Court finds it is probable that the representation of the Taxpayers' interest by existing parties

> may be inadequate and that the Taxpayers may be bound by a judgment in the action. This Court is of the opinion that unless the Taxpayers are permitted to intervene, they would not be aggrieved parties, entitling them to an appeal. (Emphasis supplied)

The Court in *United States v. Bank of Commerce,* 405 F. 2d 931, 933 (C.A. 3, 1969) observed that it is the contents of the third parties' books and records and not the tangible records themselves in which the taxpayer has a protectable interest and concluded:

> At the outset, we are confronted by the appellee's contention that the appellant lacks standing to raise the objections which he asserts. We do not agree. The rule approved by the Supreme Court in Reisman v. Caplin, 375 U.S. 440 (1964), * * * is that a taxpayer may intervene in an enforcement proceeding and challenge enforcement of the summons by raising constitutional or other objections in protection of his rights and interests. Here, *appellant's defenses, as he styles them, are aimed solely at protecting his individual rights and interests. Appellant makes no claim on behalf of the bank, either derivatively or in a representative capacity.* (Emphasis supplied)

The Courts in *Justice* and *Bank of Commerce* reached certain conclusions on which they based their decisions, that, in every respect, conform to the instant situation.

First, the Courts noted that the taxpayers were raising certain rights and privileges under the revenue statutes. Taxpayer here raises like defenses as to the records and testimony sought. Further, in *Justice* and *Bank of Commerce,* the Courts concluded that the taxpayer's interest would not be adequately represented by the existing parties. In this respect, Taxpayer was found to possess a

definite interest, evidenced by the rendition of Orders restraining Respondents, and, consequently, an interest not susceptible of being fully protected by the existing parties. And finally, both Courts found that the taxpayer may be bound by any judgment rendered in the action. The Taxpayer will likewise be bound as a result of the judgment rendered in the present enforcement proceedings.

A taxpayer's right to intervene in a judicial proceeding wherein the Internal Revenue Service seeks to enforce its summons issued in connection with the taxpayer's alleged tax liability is unequivocally supported by the decision of the Court of Appeals for the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969). The District Court in *Benford* denied intervention holding that *Reisman v. Caplin* and *United States v. Powell* do not alleviate the necessity of showing a proprietary or other special interest in the records subject of a revenue summons, and that being the taxpayer whose liability is under scrutiny is not alone sufficient a basis for intervention. The Court of Appeals responded stating: (406 F. 2d at 1193, 1194)

> If the import of *Reisman* and *Powell* were closely confined to their facts, we could well agree with the district court.
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> * * *
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> But the opinions did not qualify the broad statements that 'both parties summoned and those affected by a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims';[5] that 'In addition, third parties might intervene to protect their interests, or in the event the taxpayer is not a party to the summons before the hearing officer, he,

too, may intervene';[6] that 'This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered."[7] *The opinions did not expressly, and, as we read them, did not impliedly, limit the taxpayer's right to intervene in enforcement proceedings to situations where a legally protected interest in the records could be shown.* Had the Court intended simply to hold that the particular interests of the taxpayers involved in those cases were sufficient bases for intervention, the opinions would doubtless have made that evident. We interpret them as adopting the judicial policy with respect to I.R.S. inquisitorial summonses that the person whose tax liability is the subject of the investigation can intervene and challenge enforcement if he sees fit. (Emphasis Supplied) (Footnotes omitted).

It is submitted that no material distinction exists between the facts in this case and those present in *Benford, Justice,* and *Bank of Commerce.* Accordingly, the Fifth Circuit's decision is in direct conflict with the decisions of the aforementioned Courts of Appeal, and this Court's mandate in *Reisman v. Caplin,* 375 U.S. 440 (1964), and unless reversed stands to cause an anomalous result.

II

INTERNAL REVENUE SUMMONSES ISSUED IN A CRIMINAL INVESTIGATION FOR THE PRIMARY PURPOSE OF OBTAINING EVIDENCE FOR USE IN A CRIMINAL PROCEEDING ARE INVALID AND UNENFORCEABLE BEING OUTSIDE THE SCOPE OF SETION 7602, INTERNAL REVENUE CODE OF 1954

Discussion of the substantive issue of "improper purpose" may appear premature since the District Court

did not conduct an evidentiary hearing. Nevertheless, the Court of Appeals concluded solely upon the pleadings by which Taxpayer sought to intervene that no "improper purpose" existed to warrant the trial court's refusal to enforce the summonses; therefore the right to intervene had not been established. In light of the Opinion of the Court below, consideration must be given to the meaning of this Court's language in *Reisman v. Caplin,* 375 U.S. 440 (1964) and its reference to the right of judicial review of an administrative summons issued for an "improper purpose" in *United States v. Powell,* 379 U.S. 48, 58 (1964).

A. *The Record In The Instant Case Void Of Any Factual Determination, Requires Resort To An Objective Analysis Of The Merits On the Issue.*

The United States commenced the subject proceeding pursuant to Section 7402(b) and Section 7604(a) of the Internal Revenue Code of 1954 to enforce summonses issued under Section 7602. This section expressly enumerates the purposes for which the Secretary of the Treasury or his delegate is authorized to issue a summons in connection with the Revenue laws and imposes upon the United States the burden of proving that the *purpose* of its conduct and inquiry which prompted issuance and subsequently enforcement of the summonses had an authorized and legitimate end. *"In terms of protection to the individual, a summons submitted to a court for enforcement is at least equivalent to a search warrant." United States v. Roundtree,* — F. 2d — (C.A. 5, 1969). [69-2 USTC 9733] at page 86,066.

The Government has consistently asserted that Section 7602 authorizes the determination of tax liabilities whatever the purpose and whatever the ultimate outcome, but, reported court decisions are not in accord.[14]

In *Hinchcliff v. Clarke,* 371 F. 2d 697 (C.A. 6, 1967), the Court enforced a summons issued by a Special Agent under Section 7602. However, it was made clear that its decision was predicated *solely* on the ground that this was a *civil proceeding* and that the summons was issued *solely* in connection with the civil collection of any income tax *based upon government counsel's representation that the investigation by Internal Revenue Service had no criminal purpose. The Court added further that no evidence so acquired could be used in a criminal prosecution against the taxpayer.*

In the case at bar, the Court below summarized Taxpayer's allegations as follows:

> Appellant contends that since the function of the special agents is to investigate to see whether a crime has been committed no subpoena can be issued under the authority of Section 7602 because of the language of the Reisman opinion *'this would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution,'* citing *Boren v. Tucker, supra.* (A. 48)

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[14] *United States v. Gajewski* — F. 2d — (C.A. 8, 1970) [70-1 USTC 9146]; *Wild v. United States,* 362 F. 2d 206 (C.A. 9, 1966); *Wright v. Detwiler,* 241 F. Supp. 753 (W.D. Pa., 1964), affirmed 345 F. 2d 1012 (C.A. 3, 1964); *McCarry v. Riley,* 363 F. 2d 421 (C.A. 1, 1966), cert. den. 385 U.S. 969 (1966); *In re Magnus, Mabee & Reynard, Inc.,* 311 F. 2d 12 (C.A. 2, 1962), cert. den. 373 U.S. 902 (1963); *Siegel v. Tyson,* 331 F. 2d 604 (C.A. 5, 1964); *Tillotson v. Broughner,* 333 F. 2d 515 (C.A. 7, 1964), cert. den. 379 U.S. 913 (1964).

In the absence of an evidentiary hearing, the Fifth Circuit seemingly substituted the facts presented in *Boren v. Tucker,* 239 F. 2d 767 (C.A. 9, 1956).[15]

1. *The significance of Boren v. Tucker has been diminished.*

Boren v. Tucker does not hold that a summons issued during the course of any investigation by any Internal Revenue Service employee is to be validated by district courts merely upon request. Contrary to the implication drawn by the Court below, it would seem that the citation in *Reisman v. Caplin,* 375 U.S. 440, 449 (1964) of *Boren v. Tucker,* 239 F. 2d 767, 772-773 (C.A. 9, 1956) was not intended to limit defenses but rather merely as an example of *one* improper purpose. The United States has recently conceded the correctness of this proposition.[16]

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[15] "* * * Most significant, it seems to us, is the citation by the Supreme Court in *Reisman* as the basis for its statements relative to criminal prosecutions, of the case of *Boren v. Tucker,* 9 Cir. 239 F. 2d 767. In the *Boren* case the Ninth Circuit enforced the subpoena. In doing so, it distinguished the case of *United States v. O'Connor,* D.C. Mass., 1953, 118 F. Supp. 248. The *Boren* opinion pointed out that in *O'Connor,* an indictment had already been returned against the taxpayer; that there was no other pending investigation; and the special agent was used as a means to cause a subpoena to issue as if the case were still in the investigatory stage. * * *" (A. 49)

[16] Brief for Appellant United States pp. 22-23, *United States v. Monsey,* [69-2 USTC 9703] (S.D. Ind. 1969) on appeal to the Seventh Circuit, Docket No. 18,208, in discussing *Reisman v. Caplin,* 375 U.S. 440, 449 (1964) commented:

> "* * * *The point to be noted is that the Supreme Court* [in citing *Boren v. Tucker*] *obviously was not undertaking a critical evaluation of the criminal-use objection or of any other possible objection,* but was simply saying that, whatever the objection might be, the interested party could wait to assert it in the enforcement proceedings and did not need the prior aid of equity or of a motion to quash.[14] (Footnote omitted) [Emphasis Supplied]

Even if the factual circumstances of the instant case were identical with *Boren,* there is a crucial distinction between *Boren v. Tucker* and this case. Special Agents of the Intelligence Division, under prior regulations,[17] were authorized to *ascertain civil penalties* as well as investigate possible criminal violations. The present regulations[18] governing Special Agents clearly limit their

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[17]21 Fed. Reg. 10418 (December 1, 1956), 1959 CCH Stand. Fed. Tax Rep. ¶5988, p. 57,561:

"1118.6 * * * Intelligence Division. (1) The Intelligence Division investigates alleged criminal violations of the tax statutes, including racketeer and wagering tax cases, but excluding alcohol, tobacco and firearms tax cases. It conducts investigations of applicants who are seeking enrollment to practice before the Treasury Department and of charges against persons enrolled.

(2) The Division evaluates allegations and indications of tax law violations and determines investigations to be undertaken. It makes recommendations as to the disposition of cases investigated, *including recommendations of criminal prosecution, and the assertion of civil penalties.* It provides assistance to U. S. Attorneys and the Regional Counsel in the trial of cases. The Intelligence Division consists of groups of special agents." (Emphasis Supplied)

[18]30 Fed. Reg. 9399-9400 (July 28, 1965), 1966 CCH Stand. Fed. Tax Rep. §5988:

"1118.6 INTELLIGENCE DIVISION.

The Intelligence Division enforces the criminal statutes applicable to income, estate, gift, employment and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), *by developing information concerning alleged criminal violations thereof,* evaluating allegations and indications of such violations to determine investigations to be undertaken, *investigating suspected criminal violations of such laws, recommending prosecution when warranted,* and measuring effectiveness of the investigation and prosecution processes. The Division assists other Intelligence offices in special inquiries, drives and compliance programs and in the normal enforcement programs, including those combating organized wagering, racketeering and other illegal activity, by providing investigative resources upon regional or National Office request. It also assists U. S. Attorneys and Regional Counsel in the processing of Intelligence cases, including the preparation for and trial of cases." (Emphasis Supplied)

functions to *ascertaining whether or not a criminal violation of law has occurred* and to assisting in prosecutions.

Whatever doubts may have existed as to whether a Special Agent's duties involve criminal, civil or administrative implications seem to have been resolved by either this Court's decision in *Mathis v. United States,* 391 U.S. 1 (1968) or, through administrative promogation.[19] The principle of *Mathis,* as it relates here, is that a tax investigation can be a criminal investigation.

In consideration of the foregoing, it was unrealistic to hold, as the Court below did, that a Special Agent's function may be ignored because a criminal prosecution was not *in esse.* Concededly, one may not ultimately result; however, that is true with respect to any investigation undertaken by any policeman. Although a criminal investigation may simultaneously disclose civil liability, that does not make such an investigation any the less one with dominant criminal overtones. Where, as here, it appears that the primary purpose of determining tax lia-

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[19] Memorandum for the United States in Opposition, p. 4, *White v. United States,* Sup. Ct. No. 898, October Term 1969:

> [T]he present policy of the Internal Revenue Service is to give virtually full *Miranda warnings* to all taxpayers when they are first interviewed by a Special Agent,[2] • • •

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[2] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this 'new procedure goes beyond most legal requirements that are designed to advise persons of their rights.' 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476.

bility is for use in a criminal proceeding,[20] the summons is without the purview of Section 7602.

2. *Determination of the primary purpose for which a Summons is issued is mandatory.*

In the past it has been the Government's consistent position that only if the taxpayer could establish that the *sole* purpose of a Special Agent conducting a tax investigation was the obtaining of evidence for use in a criminal proceeding would it be improper for a summons under Section 7602 to be issued. The Government's logic then concluded that since the Special Agent is never certain that his investigation will result in a criminal prosecution, and further, since the civil aspects of the case are always pursued at the conclusion of the criminal case, these factors demonstrate that the Special Agent's investigation is not conducted *solely* for the purpose of obtaining evidence for use in a criminal proceeding. The Taxpayer submits that both the premise and conclusion are erroneous.

It is well settled that if the purpose for the issuance of the summons was to obtain evidence for use in a criminal proceeding, this on its face, is an improper use of the summons power. *Wild v. United States,* 362 F. 2d 206 (C.A. 9, 1966).

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[20]*United States v. Mothe,* 303 F. Supp. 1366, 1368 (E.D. La., 1969), on appeal to the Fifth Circuit Docket No. 28,640, involving one of the same Special Agents and Taxpayer as part of the investigation presently under review by this Court.

> "However, Special Agent Miller repeatedly testified that a major part of his job is to determine civil tax liability (Transcript, pages 8-9, 31, 32-33, 35-36), although he admitted that his primary purpose in determining tax liability is to use it as a foundation in a criminal case. (Transcript, p. 31.) * * *"

The Taxpayer submits that the only appropriate test to be applied is not whether the *sole* purpose for the issuance of the summons was the obtaining of evidence for use in a criminal proceeding,[21] but rather whether this was the *principal* or *primary* purpose. If the sole purpose test is utilized, it could be avoided simply by adding a corollary purpose of relative insignificance. Since the presence of such an insignificant secondary purpose could be completely within the Government's control, any test other than the principal purpose test would be meaningless and easily circumvented.

The Fifth Circuit Court's conclusion that when the summonses were issued, the Special Agent was not yet convinced that a crime had been committed, and therefore, the issuance of the summonses was not for the purpose of obtaining evidence for use in a prosecution *in esse,* is similar to that raised in *Camara v. Municipal Court,* 387 U.S. 523 (1967) and *See v. City of Seattle,* 387 U.S. 541 (1967). In rejecting these arguments this Court stated in *Camara,* at p. 530-531:

> "* * * It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.[6] For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official

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[21] *United States v. Ruggeiro,* 300 F. Supp. 968, 975 (C.D. Calif. 1969). (On appeal to the Ninth Circuit, Docket Nos. 24519 to 24524, inclusive):

> "To say that a summons is not being used for an improper purpose unless the existence of a proper civil purpose is absent, *United States v. DeGrosa,* 3rd Cir. 1969, * * * 405 F. 2d 926, simply begs the question. All criminal tax investigations to be prosecutable require the 'proper civil purpose' of determination of tax liability. Simply stated no tax due — no tax fraud."

> authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security. * * * " (footnote omitted).

The Government cannot seriously urge that this Court was required to determine whether the housing inspector in *Camara,* and the fire inspector in *See,* were solely seeking evidence for use in a criminal proceeding. This is simply not determinative of when or whether a search warrant is required prior to an involuntary search. The Court stated in *Camara* at p. 531: "Like most regulatory laws, fire, health, and housing codes are enforced by criminal processes." This fact, the Court reasoned required that the safeguards of the warrant procedures must be followed.

It follows in light of these pronouncements that the archaic and deceptive "sole purpose test" as stated in the cases so heavily relied upon by the Government in the past, has now been thoroughly discredited and is no longer persuasive.

3. *There has been a shift in judicial interpretation as to when an examination evolves from the investigatory to accusatory status.*

As indicated above, this Court in *Mathis v. United States,* 391 U.S. 1, 4 (1968) dealing with the necessity of "Miranda Warnings" in a tax investigation by Internal Revenue Agents, considered the argument advanced by the Government that a routine tax investigation was outside the scope of Miranda. The government sought to escape the application of *Miranda v. Arizona,* 384 U.S. 436 (1966) partially on the basis "that these questions

were asked as part of a routine tax investigation *where no criminal proceedings might even be brought*". (391 U.S. at p. 4) (Emphasis Supplied). This Court responded stating:

> * * * These differences are too minor and shadowy to justify a departure from the well considered conclusions of Miranda * * * (391 U.S. at p. 4)

A substantially identical argument is continually advanced by the government in summons enforcement proceedings.

B. *When An Investigation Conducted By Special Agents Of The Internal Revenue Service Has In Truth And Fact Turned From The Investigatory Stage To One Of An Accusatory Nature It Is Clearly Without The Scope Of Congressional Intent, In Authorizing The Use Of Administrative Summonses.*

The thrust of Taxpayer's argument in this case is *not* a failure on the part of the government to comply with the requirements of *Miranda v. Arizona,* 384 U.S. 436 (1966). But, if the investigation by a Special Agent is criminal enough in nature to require the "Miranda" protections,[22] then *a fortiori,* any summons issued under these particular circumstances is issued for the primary purpose of gathering evidence for a criminal prosecution; and, thus outside the scope of Section 7602 of the Internal Revenue Code of 1954. In addition, a summons issued to an individual taxpayer can be challenged by him based on his Fourth and Fifth Amendment rights.

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[22] Judicially in *Mathis v. United States,* 391 U.S. 1 (1968), *United States v. Dickerson,* 413 F. 2d 1111 (C.A. 7, 1969) and administratively I.R. — 949, November 26, 1968, 1968 CCH Fed. Tax Reporter, par. 6946, Memorandum in Opposition for United States, p. 4, *White v. United States,* Sup. Ct. No. 898, October Term 1969.

> * * * If * * * the inquiry is 'no longer solely a civil investigation', but ha[s] reached the stage of an investigation into possible criminal violations — 'an inquiry with dominant criminal overtones' — he is entitled to raise his fifth amendment objections. *Stuart v. United States,* 5 Cir. Sept. 17, 1969, No. 27,093 [69-2 USTC ¶9630] F. 2d. * * *
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> *United States v. Roundtree,* — F. 2d — (C.A. 5, 1969) [69-2 USTC 9733] at page 86,068.

Similarly, a corporation may challenge a summons issued to it for its own books and records as violative of Fourth Amendment rights.[23]

In *United States v. Dickerson,* 413 F. 2d 1111 (C.A. 7, 1969), a Revenue Agent assigned to audit the defendant, found he had failed to file certain income tax returns. Suspecting that a criminal violation had been committed, he suspended his examination and referred the case to the Intelligence Division. Subsequently the case was assigned to a Special Agent. The Revenue Agent was then reassigned to assist him.[24] The United States categorized this factual pattern as follows:

> All that is shown here is that the *routine audit begun by Internal Revenue became a criminal investigation,* and that the defendant was never so advised.[25] (Emphasis Supplied)

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[23] Perhaps one of the most recent and exhaustive analysis of the extent to which a summons issued to a corporation for its books and records is protected by the Fourth Amendment guarantees against unreasonable searches and seizures can be found in the Proceedings of the Twenty-ninth Annual Judicial Conference of the Sixth Circuit which appears at 45 FRD 293, 323, 327-8 (1968) Constitutional Rights in Criminal Tax Investigations by Paul P. Lipton.

[24] Brief for Appellant United States, p. 3, *United States v. Dickerson,* 413 F. 2d 1111 (C.A. 7, 1969)

[25] Brief for Appellant United States, p. 14, *United States v. Dickerson,* 413 F. 2d 1111 (C.A. 7, 1969)

The Court in *United States v. Dickerson,* 413 F. 2d 1111, 1115 (C.A. 7, 1969) stated:

> A line of cases originating between the *Escobedo* and *Miranda* decisions, notably *Kohatsu v. United States,* 351 F. 2d 898 (9th Cir. 1965), reasons that because the IRS agents cannot determine whether a crime has in fact been committed until their investigation is complete, the adversary process has not sufficiently 'focused' on the suspect as to require that warnings be given. But as Judge Will observed in his persuasive opinion in *United States v. Turzynski,* * * * 268 F. Supp. 847, 852-853 (N.D. Ill. E.D. 1967):
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> > 'This distinction between a criminal tax investigation where the taxpayer is suspected of a tax fraud not yet fully identified and a criminal investigation where a known violation of the law is attempted to be linked to a particular suspect is logically irrelevant for purposes of determining when the adversary process has begun, *i.e.,* when the investigatory machinery of the government is directed toward the ultimate conviction of a particular individual, and when, therefore, a suspect should be advised of his rights. What matter if the culprit is known before the crime or the crime before the culprit. In either case the investigator is attempting to develop evidence for the purpose of criminal prosecution and conviction.' * * *

A Taxpayer being an accused, any attempt, at this point to distinguish a criminal tax investigation from other criminal inquiries is a distinction without a difference.

III

AN INTERVENING TAXPAYER IS ENTITLED TO A FULL ADVERSARY HEARING IN CHALLENGING ENFORCEMENT OF ADMINISTRATIVE SUMMONSES BY THE INTERNAL REVENUE SERVICE

The final issue involves the propriety of the Court of Appeals affirming the trial court's action in enforcing the administrative Summonses without holding an evidentiary hearing.

It has been firmly established that both the party summoned and an intervening taxpayer must be accorded a meaningful adversary hearing before a district court may enforce a summons. *Reisman v. Caplin,* 375 U.S. 440 (1964); *United States v. Powell,* 379 U.S. 48, 58 (1964).

> * * * This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered. At the hearing, he 'may challenge the summons on any appropriate ground,' *Reisman v. Caplin,* 375 U.S. 440, at 449, 84 S. Ct. at 513. Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the Court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the Court's process is on the taxpayer, * * * (379 U.S. at 58)

The tenor of the *Powell* decision is that "the parties must be given a full opportunity in an adversary hearing to present their case." *Venn v. United States,* 400 F. 2d 207, 212, n. 12 (C.A. 5, 1968). See also, *United States v. Benford,* 406 F. 2d 1192, 1194 (C.A. 7, 1969); *D. I. Operating Co. v. United States,* 321 F. 2d 586 (C.A. 9, 1963). Clearly the lower Courts did not accord the Taxpayer any of these rights when as occurred during the proceedings at the trial level argument was limited to the Taxpayer's Motion to Intervene

The Fifth Circuit in precluding intervention denied the Taxpayer an adversary hearing, a right it subsequently recognized in *United States v. Roundtree,* — F. 2d — (C.A. 5, 1969) [69-2 USTC 9733] at page 86,068:

> A proceeding to enforce a summons in an adversary proceeding, *Reisman v. Caplin,* 1964, [64-1 USTC ¶ 9202] 375 U.S. 440, 446, 84 S. Ct. 508, 11 L. Ed. 2d 459; *Dunn v. Ross,* 5 Cir. 1966, [66-1 USTC ¶ 9238] 356 F. 2d 664, 667. In the absence of other statutory directions, the Federal Rules of Civil Procedure apply. Fed. R. Civil P. 81(a)(3); *Powell,* 379 U.S. at 58 n. 18; *United States v. McKay,* 5 Cir. 1967, [67-1 USTC ¶ 12,449] 372 F. 2d 174. We have construed the thrust of this determination to be that 'the parties must be given a full opportunity in an adversary hearing to present their case'. *Venn,* 400 F. 2d 212 n. 12.

The trial court took no testimony, nor did it permit the Taxpayer to submit evidence or cross-examine Government witnesses in an effort to attack its pleadings and affidavits. Under these circumstances, the Taxpayer was not afforded the adversary proceeding prescribed by this Court in *Reisman* and *Powell,* nor by the Fifth Circuit itself:

> "... [I]t hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all. *Atlantis Development Corporation v. United States,* 379 F. 2d 818, 827 (C.A. 5, 1967) * * * "

The Taxpayer, of course, recognizes if there is no genuine issue as to any material fact, the Government may move for summary judgment. If there were no issues of fact requiring a hearing in the instant case, as the Government belatedly contends, it should have moved for summary judgment in the District Court. This would have given the Taxpayer an opportunity to file opposing affidavits and to take other steps to protect his interests. The Taxpayer's challenges to the Summonses should not be decided on the present record, void as it stands.

In *United States v. Powell,* 379 U.S. 48 (1964), the Solicitor General submitted that an action to enforce Internal Revenue Summonses is an adversary proceeding requiring an evidentiary hearing.[26] Presently, the Government belies itself and inconsistently asserts that a summary procedure is appropriate and that the party summoned must "show cause" that there has been an abuse of the summons power before there need be an adversary hearing.

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[26] *Reisman v. Caplin,* 375 U.S. 440, 446. Brief for Petitioner United States, *United States v. Powell,* p. 10-11, Sup. Ct. No. 54, Oct. Term 1964:

> To enable the Commissioner to carry out effectively his investigatory duties, federal courts are vested with jurisdiction to compel compliance with a summons 'by appropriate process' (Secs. 7402(b), 7604(a)). The normal procedure, as here, is an application by the Commissioner for an order to show cause why the person summoned should not be ordered to comply. There results 'an adversary proceeding affording a judicial determination of the challenges to the summons.'

A. *Summons Enforcement Proceedings Are Governed By The Federal Rules of Civil Procedure 81(a)(3).*

Attention must first be directed to the question of whether, and if so, in what manner, the Federal Rules of Civil Procedure, and particularly Part V, Depositions and Discovery Rules 26 thru 37, apply to the proceedings to enforce an Internal Revenue Summons.

In *Falsone v. United States,* 205 F. 2d 734, 742, (C.A. 5, 1953), cert. den., 346 U.S. 864, (1953), the Court commenting on this particular point, stated:

> * * * Rule 81(a)(3) makes the Rules of Civil Procedure applicable to 'proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States . . .'. That means that the rules are applicable to the court action to enforce the summons under 26 USCA Section 3633 (a)." [To the same effect under the Internal Revenue Code of 1954, 26 USC 7402(b)]

Thus, it is clear, that the Federal Rules of Civil Procedure are designed to apply to actions to enforce an Internal Revenue Summons.[27] In the absence of a showing by the Government of an extremely compelling need to eliminate the application of Federal Rules of Civil Procedure, and particularly those relating to discovery, the Rules should apply to enforcement proceedings. Those Rules are intended for the convenience of the Court and for the protection of litigants; they provide an or-

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[27] *United States v. Powell,* 379 U.S. 48, (1964); *United States v. Bank of Commerce,* 405 F. 2d 931, (C.A. 3, 1969); *United States v. Moriarty,* 278 F. Supp. 187, (E.D. Wis., 1967); *Kennedy v. Rubin,* 254 F. Supp. 190, (N.D. Ill., 1966); *Venn v. United States,* 400 F. 2d 207 (C.A. 5, 1968).

derly enlightened mode of procedure for litigation. In *United States v. Proctor & Gamble Company,* 356 U.S. 677, (1958), this Court pointed out why it is imperative that the discovery rules apply to civil cases:

> * * * Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor,* 329 U.S. 495. They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. *Id.,* 329 U.S. at 501. Only strong public policies weigh against disclosure. * * *

Reaffirming prior edicts construing the discovery devices sanctioned by Part V of the Federal Rules of Civil Procedure, this Court in *Schlagenhauf v. Holder,* 379 U.S. 104, (1964) embarking upon a discussion preliminary to the applicability of Rule 35 stated:

> * * * We enter upon determination of this construction with the basic premise 'that the deposition-discovery rules are to be accorded a broad and liberal treatment,' *Hickman v. Taylor, supra,* at 507, to effectuate their purpose that 'civil trials in the federal courts no longer need to be carried on in the dark.' *Id.,* at 501.

The propositions advanced by the Government against Taxpayer's discovery could be made in any law suit. This would, of course, defeat the purpose for which the Rules were promulgated, being to lessen the burden placed upon the courts, through an attempt to sift the relevant and material facts, the foundation for which are initially unknown.

1. *The right to a full hearing is a meaningless formality without the concomitant right to discovery of facts supporting defenses.*

In the case of *United States v. Powell,* 379 U.S. 48, 58, (1964), this Court held that this adversary hearing is not a meangingless formality. An adversary hearing is not a summary hearing. Indeed, to any lawyer steeped in the traditions of Anglo-American common and constitutional law, both terms are mutually exclusive. The United States Court of Appeals for the Seventh Circuit recently pronounced a standard in summons enforcement cases in *United States v. Benford:*

> The rule that the taxpayer may intervene and is entitled to an adversary hearing before enforcement is ordered does not, in our opinion, extend *carte blanche* to obstruct and delay the enforcement proceeding. Rule 81(a)(3) F. R. Civ. P. contemplates that in any particular enforcement proceeding the court may modify or limit the applicability of the federal rules.[8] Mr. Mackey has called our attention to district court decisions holding that a respondent in an enforcement proceeding is entitled to conduct pretrial discovery.[9] Both of those decisions recognized that under Rule 81(a)(3) there would be cases where it would not be an abuse of discretion to bar discovery, and both recognized that the court could limit the scope of and time for taking depositions. The standard, as we see it, is that taxpayer must be afforded a meaningful adversary hearing of legitimate challenges. (406 F. 2d 1191, 1194 (C.A. 7, 1969)

This position has received affirmance from the Third Circuit Court of Appeals in the recent case of *United*

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[8]See 1946 Committee Note, 7 Moore's Federal Practice p. 4413.
[9]*Kennedy v. Rubin* (N.D. Ill., 1966), 254 F. Supp. 190; *United States v. Moriarty* (E.D. Wis. 1967), 278 F. Supp. 187.

States v. Bank of Commerce, 405 F. 2d 931, (C.A. 3, 1969). Taxpayer does not request nor desire to undertake an indiscriminate searching into the Government files,[28] but anticipates that discovery be limited to the scope enunciated and approved by the United States Court of Appeals for the Seventh Circuit in *United States v. Benford,* 406 F. 2d 1191 (C.A. 7, 1969).

2. *Documents such as Internal Revenue Manuals and job descriptions are vital to Taxpayer's defenses.*

These documents are not merely relevant to the issues in enforcement proceedings in some inferential manner but indubitably contain admissible direct evidence upon each of the critical issues recognized by this Court in *Reisman v. Caplin.* The relevancy of Internal Revenue Service Manuals of Instruction, under a Rule 34 Motion for Production was recognized by the Court in *United States v. Moriarty* [69-1 USTC 9169], (E.D. Wis. 1968).[29]

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[28] Compare *United States v. Howard,* 360 F. 2d 373, 381, (C.A. 3, 1966) ". . . An examination of the interrogatories filed by Howard demonstrates their extreme broadness and their lack of utility save as an harassment to the United States."

[29] *United States v. Moriarty,* at page 83,793:

"In reaching this conclusion we have addressed ourselves to three salient questions. The first of these is whether the manuals are relevant to the subject matter involved in the action pending here and whether their production appears reasonably calculated to lead to the discovery of admissible evidence. Bearing in mind the legal authority of *Boren v. Tucker,* [57-1 USTC ¶9246] 239 F. 2d 767 (9th Cir. 1936) and *Reisman v. Caplin* [64-1 USTC ¶9202] 375 U.S. 440 (1964), we find that these criteria of relevance and fruitfulness are satisfied here. In our judgment it is reasonable to expect that the manuals will be relevant and that their production is reasonably calculated to lead to a clarification of whether the administrative summons at issue here was served for the possibly improper purpose of obtaining evidence merely for use in a criminal prosecution * * *" (Footnote omitted)

In further support of the right of discovery through production of documents, this Court's attention is invited to the recent summons enforcement proceeding in *United States v. Monsey,* [69-2 USTC 9703] (S.D. Ind. 1969) on appeal (C.A. 7, 1970) Docket No. 18,208, in which the District Court ordered inspection and copying of documents similar to those Taxpayer would have sought in the District Court upon gaining party-litigant status. Any refusal or denial to produce the documents sought, for all practical purposes, erects an impenetrable barrier to discovery of evidence relevant to the crucial issues previously discussed and effectuates a suppression of material evidence.

To Taxpayer's knowledge, in no case has claim of privilege been asserted by the Government. Consequently, since there is no known privilege or public policy permitting the Government to withhold vital evidence and documents, any failure to produce is without meritorious standing. *United States v. Reynolds,* 345 U.S. 1 (1953) and *United States v. Moriarity,* [69-1 USTC 9169] (E.D. Wis., 1968). The evidence in the requested documents is not available to a taxpayer from any other source and represents the best and only reliable evidence of the purposes and motives of the Government in directing and pursuing the Summonses.

B. *There Is No Valid Reason For Postponing Adjudication Of Taxpayer's Objections To Enforcement Of The Summonses Until After Criminal Indictment.*

An evidentiary hearing contemplates a showing of the legitimate purpose of the summons, the necessity of the records and testimony sought and that such information

has not been previously procured. To relegate the question of "improper purpose" to a subsequent motion to suppress during or prior to a criminal trial is generally unsatisfactory to both a defendant and the Government.

As Chief Judge Lumbard stated in his concurring opinion in *In re Magnus Mabee & Reynard, Inc.*, 311 F. 2d 12, 18 (C.A. 2, 1962):

> * * * But if the person summoned chooses not to contest enforcement, a taxpayer's rights in a pending criminal action might go unprotected unless he is permitted to assert them in the enforcement proceedings. The rules of standing are not so rigid that a court whose authority is sought in aid of a summons must keep its doors closed to the taxpayer in such situation. Neither the taxpayer nor the government would be well served by postponing until trial a hearing of the claim that pre-trial discovery violated the Federal Rules of Criminal Procedure; at that stage it might be very difficult to unravel properly obtained evidence from that which, directly or indirectly, was obtained by allegedly unauthorized means. * * *

It is apparent that the District Court did not even entertain the possibility of an evidentiary hearing. Thus, there was no discretionary denial but a total misconception of the nature of an enforcement action.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the cause remanded to the United States District Court, Middle District of Florida, Tampa Division, with instructions to grant intervention and a full evidentiary hearing on the issues raised in the pleadings.

Respectfully submitted,

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Dated: April, 1970

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C., 1964 ed.):

SECTION 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized —

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SECTION 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of district court. — If any person is summoned under the internal revenue laws to ap-

pear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

28 U.S.C., 1964 ed. Civ. Proc. R.:

Rule 24(a)(2) Federal Rules of Civil Procedure (1966):

(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action:

* * *

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 81(a)(3) Federal Rules of Civil Procedure (1968):

(a) TO WHAT PROCEEDINGS APPLICABLE.

* * *

(3) In proceedings under Title 9, USC, relating to arbitration, or under the Act of May 20, 1926, ch 347, §9 (44 Stat 585), USC, Title 45 §159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

RESPONDENT'S

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 942

KEVIN L. DONALDSON, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINION BELOW

The opinion of the court of appeals (A. 42–52) is reported at 418 F. 2d 1213.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1969 (A. 53). The petition for a writ of certiorari was filed on December 11, 1969, and was granted on February 27, 1970 (397 U.S. 933). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a taxpayer may intervene of right in a proceeding to enforce an internal revenue summons directed to a third party, where he asserts no privilege

or proprietary interest in the material sought and seeks only to attack the purpose of the summons.

2. If the foregoing question is answered in the affirmative, the further question is raised whether an internal revenue summons may properly be used in aid of an administrative determination whether to recommend a criminal prosecution.

STATUTES, RULES AND REGULATIONS INVOLVED

The pertinent provisions of Sections 6653, 6659, 7402, 7602, 7604 and 7801 of the Internal Revenue Code of 1954, Rules 24 and 81 of the Federal Rules of Civil Procedure and Section 301.7602–1 of the Treasury Regulations are set forth in the Appendix, *infra*, pp. 41–46.

STATEMENT

On November 25, 1968, respondents (the United States and John P. Grady, a Special Agent of the Internal Revenue Service) filed two petitions in the United States District Court for the Middle District of Florida, asking that the court enforce two internal revenue summonses relating to the tax liabilities of petitioner for the years 1964, 1965, 1966 and 1967 (A. 1–5). Each summons called for the production of records of the Acme Circus Operating Company, Inc., doing business as Clyde Beatty-Cole Circus, relating to its employment, compensation and reimbursement of the present petitioner during the years 1964 through 1967 (A. 9–11).[1] The summonses were directed to Acme

[1] We agree with petitioner's statement (Br. 3) that the two summonses present identical questions and that the record on the summons issued to Joseph J. Mercurio adequately presents the issues on both summonses and petitions.

and to Joseph J. Mercurio, directing them to appear before Special Agent Grady on September 23 and 24, 1968 (A. 9). On September 13, the district court, in proceedings prior to and separate from the present ones, enjoined Acme and Mercurio from complying with the summonses until ordered to do so by a court of competent jurisdiction (A. 27–30). The only parties to those injunction actions were petitioner and the witnesses.

The petitions for enforcement of the summonses were supported by affidavits of Special Agent Grady and of Special Agent Bruce B. Miller,[2] alleging that the summonses were issued to obtain information relating to petitioner's financial transactions with the Acme Circus Operating Company, in furtherance of an investigation into petitioner's correct income tax liability for the years 1964 through 1967, inclusive (A. 6–7, 12–15). In response to orders to show cause issued by the district court (A. 16), both witnesses indicated no objection to compliance, stating that they would previously have complied with the summonses were it not for the injunctions against them. (A. 25–26).

On December 9, 1968, petitioner, relying on Rule 24(a)(2) of the Federal Rules of Civil Procedure, moved to intervene in the enforcement procedings, alleging that it was his tax liability which was under investigation, and further alleging as follows (A. 17–18):

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[2] The agents were employed by the intelligence divisions of the Tampa, Florida, and New Orleans district offices, respectively, of the Internal Revenue Service.

> 2. Kevin L. Donaldson, the Intervenor, has an interest relating to the transactions which are the subject of this action and is so situated that the disposition of this action may, as a practical matter, impair or impede his ability to protect that interest unless the Intervenor's interest is adequately represented by existing parties, in that a judgment of this Court may adversely and prejudicially effect [sic] the substantial rights and privileges secured to him by the Constitution of the United States, as will more definitely appear from the Intervenor's proposed Answer, a copy of which is attached hereto.

Petitioner's proposed answers to the petitions alleged, *inter alia,* that the special agents were guilty of bad faith in asserting that their investigation was for the purpose of ascertaining petitioner's correct income tax liability; that the agents were investigating petitioner "for the express and sole purpose of obtaining evidence concerning any violations of the criminal statutes applicable to the tax laws of the United States"; and that, therefore, the summonses were not issued for any purpose enumerated in Section 7602 of the Internal Revenue Code of 1954 and could not be enforced under Sections 7402(b) and 7604(a) (A. 21–22).

Additional defenses raised in the proposed answers asserted that the summonses were too sweeping and failed to demonstrate relevancy to petitioner's correct tax liability, that Special Agents Grady and Miller had no personal knowledge of the records or testimony required in the summonses, and that the sum-

monses violated petitioner's rights to be free of unreasonable search and seizure and from giving testimony tending to incriminate him (A. 22–23). Petitioner does not, however, raise in this court the validity of these defenses or his right to raise them by intervention.

The United States opposed petitioner's motions to intervene on the grounds, among others, that petitioner had no legal, equitable, possessory, or other interest in the records that would give him standing to object to enforcement of the summonses, and that the intervention would unduly delay and encumber expeditious adjudication of the rights of the original parties to the enforcement actions (A. 31–32). The district court denied the motions to intervene (A. 33) and petitioner appealed from the denial. The district court further issued orders, dated January 16, 1969, enforcing the summonses (A. 34–36), but stayed them pending petitioner's appeal (A. 38). The court of appeals affirmed the orders enforcing the summonses on October 30, 1969 (A. 53), but has continued the stays pending this Court's decision.

ARGUMENT

INTRODUCTION AND SUMMARY

In substance, petitioner's contention in this case is that he has a right to prevent the Internal Revenue Service from questioning third parties—with whom he has no relationship of privilege and who have no potential evidence in which he has any claim of proprietary interest—about their knowledge of matters

pertinent to his tax liabilities. The only reason he asserts for thus hampering the tax investigation is that it may lead to a recommendation of criminal prosecution; this possibility, he argues, deprives the Service of statutory authority to use the administrative summons procedures established under the Internal Revenue Code "[f]or the purpose of ascertaining the correctness of any return [or] * * * determining the liability of any person for any internal revenue tax * * *" (26 U.S.C. 7602).

The courts below properly rejected petitioner's attempt to intervene in the proceedings for enforcement of the summonses seeking records of his employment and compensation during the years under investigation for two reasons: first, because the absence of any asserted privilege or proprietary interest deprives petitioner of any standing to intervene in the enforcement proceedings; and, second, because in any event the fact of an ultimate criminal purpose would not bar enforcement of a summons in the posture of the present investigation.

A.

Whether one views the right of intervention as governed by Rule 24(a)(2) of the Federal Rules of Civil Procedure or independently by this Court's language in *Reisman* v. *Caplin*, 375 U.S. 440, the same criteria apply to determine whether a taxpayer's "interests" are sufficient to warrant intervention. Both Rule 24(a)(2), when read together with Rule 81(a)(3), and *Reisman* embrace sufficiently flexible standards to permit this Court to fashion intervention guidelines which take into account both the legitimate interests

of the taxpayer and the need for effective and expeditious enforcement of the internal revenue laws.

Where a taxpayer asserts a claim based on a proprietary interest in the evidence sought through the enforcement of a summons or a claim that the evidence sought embodies privileged communications, failure to allow intervention in enforcement proceedings may well, in the language of Rule 24(a)(2), "impair or impede his ability to protect" those legally cognizable interests. But a taxpayer's simple "interest" in not having the government investigate his tax liabilities or whether he has been guilty of tax fraud—when there is no claim of direct intrusion upon any of his personal rights—is, in the language of the Rule, not an "interest relating to the property or transaction which is the subject of the [enforcement] action * * *." Any valid objection that petitioner might have to the tax investigation may be asserted if and when the investigation results in proceedings against him. Accordingly, there is no reason for allowing a taxpayer in petitioner's position to litigate anticipatorily the propriety of the investigation and summonses issued in furtherance thereof. Allowance of intervention for this purpose results in unnecessary protraction of summons enforcement proceedings, with delays highly prejudicial to the valid governmental interest in effective administration of the tax laws.

B.

Even if the Court should disagree with our position that petitioner has no basis for intervention, in any event

the decision below should be affirmed because there is no impropriety in the use of internal revenue summonses in investigations like the present one involving petitioner. Petitioner's substantive objection to the summonses is based solely upon a proposition of law—that the statute does not permit an internal revenue summons to be used when its "primary purpose" is to aid the Internal Revenue Service in determining whether or not it should recommend that the Department of Justice prosecute a taxpayer under the tax laws. The tax laws, however, make any such distillation of the "purpose" of an investigation impossible and irrelevant, since the existence of liability is obviously crucial to a criminal prosecution as well as civil proceedings and fraud is a factor in the amount of liability as well as a possible basis for criminal action. The organization of the Internal Revenue Service—which we shall describe in some detail—necessarily reflects this interrelationship between civil and criminal factors, and an investigation of a taxpayer suspected of fraud often involves both the intelligence division and the regular audit division. Thus, in practice there is no such thing as an investigation having a "primary" criminal purpose; indeed, in 1969 only slightly over one-half of the full-scale investigations completed by intelligence divisions produced recommendations to prosecute, and the others uncovered large deficiencies and penalties to be collected civilly. Any decision to recommend prosecu-

tion is not made until after a special agent of an intelligence division completes his report—that is, until well after the stage at which the investigation of petitioner now is. Thus, this case does not involve the question whether a summons may be used specifically to obtain evidence for a prosecution that is under way.

The language and the legislative history of Section 7602 reflect these realities of tax administration, and offer no support for petitioner's attempt to make an artificial distinction between "civil" and "criminal" purposes. Rather, it is clear, not only from the language of the present section but also from the language and history of the predecessor sections that it carries forward without substantive change, that Congress directly contemplated that the summons procedures would be used in investigations into "false or fraudulent" returns looking toward possible criminal prosecutions. And, in that context, the dictum in *Reisman* v. *Caplin,* 375 U.S. 440, upon which petitioner heavily relies, is consistent with such an interpretation of the statute, as numerous decisions by the courts of appeals since *Reisman* agree. Accordingly, there is no sound basis for petitioner's contention that, in effect, the Internal Revenue Service must either forswear any ultimate criminal prosecution when fraud is suspected or else relinquish the indispensible investigatory tools that Congress has provided for the general administration of the tax laws.

I. A TAXPAYER MAY NOT INTERVENE IN AN INTERNAL REVENUE SUMMONS ENFORCEMENT PROCEEDING UNLESS HE ASSERTS A PROPRIETARY INTEREST IN THE MATERIAL SOUGHT OR A PRIVILEGE AGAINST ITS DISCLOSURE

A. THE RIGHT TO INTERVENE MUST BE DETERMINED BY CONSIDERING THE FACTORS ESPECIALLY APPLICABLE TO INTERNAL REVENUE SERVICE INVESTIGATIONS

Petitioner argues that his evident concern with the outcome of the tax investigation that gave rise to the summonses to Acme and Mercurio constitutes, under the literal language of Rule 24(a)(2) of the Federal Rules of Civil Procedure, such an "interest relating to the property or transaction which is the subject of the [enforcement] action" that its potential "impairment" "as a practical matter" if the summonses are enforced gives him an automatic right to intervene.[3] That Rule, he further contends, applies in full force because of this Court's statement in *United States* v. *Powell*, 379 U.S. 48, 58, n. 18,[4] that

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[3] Petitioner based his motion to intervene on Rule 24(a)(2) (A. 17), but as noted by the court of appeals, relied solely on *Reisman* v. *Caplin*, 375 U.S. 440, on oral argument below (A. 45–46).

[4] The applicability of the Federal Rules of Civil Procedure was not directly made an issue in the *Powell* briefs, although taxpayer's brief (pp. 21–22) cited *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731 (C.A. 9), which held only that it was a matter of no consequence for the government to style its application for enforcement of an internal revenue summons as a "petition" rather than a "complaint" and involved no other aspect of the Federal Rules of Civil Procedure. In addition, the *Powell* briefs did not call attention to the fact that *Martin* v. *Chandis Securities Co.*, *supra*, was decided prior to the 1946 amendments to Rule 81(a)(3), which introduced the current

> [b]ecause § 7604(a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731. The proceedings are instituted by filing a complaint, followed by answer and hearing. * * *

Petitioner alternatively asserts that, aside from the mandate of Rule 24(a)(2), language used in this Court's decision in *Reisman* v. *Caplin*, 375 U.S. 440, which made no reference to the Federal Rules of Civil Procedure, specifically authorizes a taxpayer to intervene to challenge the validity of a summons issued to a third party on the ground that the investigation has an improper purpose.

Reisman held that a taxpayer's attorney, in a suit brought against the Commissioner and the taxpayer's accountants, was not entitled to an injunction restraining compliance with a summons requiring the accountants to produce a quantity of records, attorney's workpapers, and audit reports. The Court found that the taxpayer and the attorney had an adequate remedy in their right to appear or intervene and assert their objections both before the investigating agent and before the district court in the event the government brought an action to enforce the summons. In passages which have given rise to much conflict among the circuits, the opinion went on as follows (375 U.S. at 445, 449):

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express provision that, while the Rules would apply to administrative summons enforcement proceedings, their application could be curtailed by a rule or an order of the district court.

> [T]he Government concedes that a witness or any interested party may attack the summons before the hearing officer. There are cases among the circuits which hold that both parties summoned and those *affected by* a disclosure may appear or intervene before the District Court and challenge the summons by asserting their constitutional or other claims. * * * We agree with that view and see no reason why the same rule would not apply before the hearing officer. * * *
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> * * * * *
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> Furthermore, we hold that in any of these proceedings before either the district judge or United States Commissioner, the *witness* may challenge the summons on any appropriate grounds. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution, * * * as well as that it is protected by the attorney-client privilege * * *. In addition, third parties *might* intervene *to protect their interests,* or in the event the taxpayer is not a party to the summons before the hearing officer, he, too, *may* intervene. [Emphasis added.]

We treat both of petitioner's theories together as, in our view, the same criteria for intervention apply under the Federal Rules and under the language of *Reisman* v. *Caplin*. Indeed, the Federal Rules are expressly made applicable to summons enforcement proceedings by Rule 81(a)(3), and there is nothing inconsistent with such application in *Reisman*.

Rule 81(a)(3) permits a flexible application of the

Rules to summons proceedings, expressly authorizing the district courts to limit the applicability of the Rules by local rule or order.[5] The Advisory Committee on the Rules stated the purpose as follows (note of the Advisory Committee, 7 Moore's *Federal Practice* (2d ed.), par. 81.01(6), p. 4413):

> * * * [A]lthough the provision allows full recognition of the fact that the rigid application of the rules in the proceedings themselves may conflict with the summary determination desired * * *, it is drawn so as to permit application of any of the rules in the proceedings whenever the district court deems them helpful.

The courts of appeals are in general agreement that the reference in *Powell* to the Federal Rules was not intended to impair the summary disposition of enforcement proceedings as long as the person summoned received all fundamental rights and an adversary hearing. See, *e.g., United States* v. *Gajewski,* 419 F.2d 1088 (C.A. 8), certiorari denied, April 20, 1970, No. 1261, 1969 term; *Venn* v. *United States,* 400 F.2d 207, 212, n. 12 (C.A. 5); *McGarry's Inc.* v. *Rose,* 344 F.2d 416, 418 (C.A. 1). Both *Venn* and *McGarry,* for example, sanctioned the continued use of petitions and show cause orders to commence enforcement proceedings in lieu of the conventional pleadings and measured responses which characterize ordinary civil litigation.

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[5] See, *e.g.*, Rule 24 of the Local Rules of the United States District Court for the Northern District of Indiana authorizing enforcement proceedings to be commenced by petition and order to show cause. *United States* v. *Benford,* 406 F. 2d 1192, 1193 (C.A. 7).

At the time of the *Powell* decision, Rule 24(a)(2) conditioned intervention of right upon a showing that the applicant "* * * is or may be bound by a judgment in the action." Under that version, it was not enough that the applicant reasonably feared such practical prejudice from the judgment as the application of comity in future litigation. *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 694. In 1966, the Rule was amended to substitute the present provision allowing intervention of right where "the disposition of the action may as a practical matter impair or impede [the applicant's] * * * ability to protect" the interest asserted. But this did not eliminate all restraints upon intervention. The amendment was adopted in conjunction with the revision of Rules 19 and 23 relating to joinder of parties and class actions, with the general purpose to facilitate the effective resolution of controversies "by involving as many apparently concerned persons as is compatible with efficiency and due process." *Nuesse* v. *Camp,* 385 F.2d 694, 695 (C.A. D.C.). See also Notes of the Advisory Committee, 3B Moore's *Federal Practice* (2d ed.), par. 24.01(10), p. 24–17. In the context of a case allowing parents of school children to intervene in an action to compel redistribution of school resources, *Smuck* v. *Hobson,* 408 F. 2d 175, 179 (C.A.D.C.), the determination to be made in applying the amended rule was stated as follows:

> The decision whether intervention of right is warranted thus involves an accommodation between two potentially conflicting goals: to

> achieve judicial economies of scale by resolving related issues in a single lawsuit, and to prevent the single lawsuit from becoming fruitlessly complex or unending. Since this task will depend upon the contours of the particular controversy, general rules and past decisions cannot provide uniformly dependable guides. * * *

Similar conflicting goals are present in summons enforcement proceedings. The desire to resolve all potential claims which might be asserted by non-parties, relating to evidence sought through the enforcement of a summons, must be balanced against the desirability of permitting the Secretary of the Treasury to conduct investigations in furtherance of his duty to enforce the internal revenue laws without becoming hopelessly ensnarled in litigation over the scope of his investigatory authority. In view of these conflicting considerations, it is plainly an over-simplification to say that a taxpayer's natural interest in any investigation of his liabilities and the obvious detriment to him that can result from such an investigation automatically qualify him for intervention of right under Rule 24(a)(2) so that he may seek to stop the investigation. Rather, the "interest" and "impairment" pertinent to that Rule must be evaluated in the light of these considerations, especially since the Rule itself is subject to modification (under Rule 81(a)(3)) to fit the special needs of an enforcement proceeding. *Reisman* v. *Caplin* is fully consistent with such a balancing of equities.

B. INTERVENTION IN A SUMMONS ENFORCEMENT PROCEEDING SHOULD BE PREDICATED UPON A LEGAL INTEREST IN THE MATERIAL SOUGHT AND NOT MERELY UPON AN OBJECTION TO THE INVESTIGATION

The "interests" that may be asserted by a taxpayer seeking to intervene in judicial enforcement proceedings may be divided into three types. In the first place, he may assert that he has a proprietary interest in records sought through the enforcement of the third party summons. Such proprietary interest may, for example, give rise to a constitutional claim that enforcement of the summons would compel him to incriminate himself. Secondly, a taxpayer might claim that the records or testimony sought are privileged because, for example, they involve communications between the taxpayer and his attorney. Finally, like petitioner, he may have no proprietary interest or claim of privilege but nevertheless say that he is "interested" because the information sought may be used against him. In this last situation, he would normally—as in this case—seek to intervene in order to object to the purpose of the investigation or to the manner in which it is being carried out.

As we shall discuss, intervention is entirely appropriate in a reasonable effort to protect the first two kinds of interest, and there has been no dispute in such cases. The question that has given rise to serious conflicts among the courts of appeals—and to this case—is whether a taxpayer lacking a privilege or proprietary interest may intervene.

1. The conflicting views

This Court's language in *Reisman* v. *Caplin* did not define the "constitutional or other claims" or "interests" (375 U.S. at 445) that would entitle a taxpayer to intervene to oppose enforcement of a summons directed, as here, to a third party. The "claim" or "interest" at issue in *Reisman* was grounded upon the familiar concept of attorney's work product; conflict has subsequently arisen with respect to the possible broader application of those terms.

In *United States* v. *Benford*, 406 F. 2d 1192 (C.A. 7), for example, *Reisman* was interpreted as entitling a taxpayer to intervene as of right simply because his tax liability was the subject of investigation. The court ruled that the controlling stockholder of a corporation was entitled to intervene in an action to enforce an internal revenue summons issued to a corporate officer for the corporate books where the stockholder alleged that the investigation was being conducted to obtain evidence for use in a criminal prosecution and with the intent of harassing the stockholder into settling assessed tax deficiencies for earlier tax years.[6] District courts in the Seventh Circuit now allow intervention by the taxpayer automatically in cases where, as here, the taxpayer alleges that the purpose of the internal revenue investigation and sum-

[6] In *Benford*, the intervenor had earlier been convicted of attempting to evade taxes on unreported income of over one million dollars, for the years 1956 through 1960. The revenue agent assigned to audit tax years 1961 through 1965, the years in issue, testified that his preliminary investigation disclosed a continuing pattern of fraudulent practices.

mons is to determine whether he has committed criminal violations of the tax laws.[7]

Both the Third and Sixth Circuits have also read *Reisman* as sanctioning broad intervention rights. In *United States* v. *Bank of Commerce*, 405 F. 2d 931 (C.A. 3), a taxpayer's intervention was upheld upon his allegation that an internal revenue summons issued to a bank for records relating to the taxpayer was based upon information acquired by an illegal search; the taxpayer did not assert any proprietary interest in the bank records sought. Similarly, in *Justice* v. *United States*, 365 F. 2d 312 (C.A. 6), a taxpayer was allowed to intervene and raise constitutional objections to the bank's production of records pursuant to a summons.

The First and Second Circuits, as well as the Fifth Circuit in the opinion below, on the other hand, have held that the "interests" referred to in *Reisman* as warranting intervention do not include a taxpayer's concern about records which are the sole and unprivileged property of a third person. See *O'Donnell* v. *Sullivan*, 364 F. 2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969; *Application of Cole*, 342 F. 2d 5, 7 (C.A. 2), certiorari denied, 381 U.S. 950. In *Cole*, the court stated, in holding that a taxpayer had no right to notice of the issuance of a summons (342 F. 2d at 7–8):

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[7] See *United States* v. *Learner*, 298 F. Supp. 1104 (S.D. Ill.); *United States* v. *Schoendorf*, 70-1 U.S.T.C., par. 9178 (E.D. Wis.); *United States* v. *Monsey*, 69-2 U.S.T.C., par. 9703 (S.D. Ind.).

> * * * [A]ll of the records, documents and papers which were the subject matter of the summons were the property of the Bank on whom the summons was served. None of the material sought belonged to the taxpayers or involved the work product of their attorneys. They had no interest in any of them in the sense that they had a right to any of them. * * * Reisman laid down no sweeping requirement that thenceforth all examinations of third parties must, to be valid, be preceded by notice to the taxpayer whose tax liability was being investigated.
>
> The taxpayer, under circumstances where only books, records and other papers belonging to the third party are the subject of the summons, has no standing to object to the summons * * *.

We submit that the approach of the First and Second Circuits and the court below is consonant with sound judicial administration, having due regard for the fundamental interests of taxpayers in certain records and communications while not unduly interfering with the performance of the Secretary's investigatory duties.

2. A taxpayer in petitioner's situation has no immediate interest that warrants disruption of investigative procedures that do not touch him directly and personally

As we have stated, it is proper for a taxpayer to intervene to assert his privilege or proprietary interest in material that is being sought from a third party. This is because his claim is that the disclosure would itself directly violate *his* rights with respect to *that*

material. Moreover, as with respect to evidence that is the proper subject of a motion to suppress under F.R. Crim. P. 41(e), there is a special reason why the propriety of the government's possession of the material should be determined preliminarily: If the material is tainted, the government may not use either that material, or other evidence derived from it, against the taxpayer, and prompt suppression will avoid the unscrambling problems that would otherwise arise at a trial. Thus, although intervention to present claims of privilege or proprietary interest disrupts the investigation in the short run, it is justified both by the strength of the taxpayer's immediate and direct interest and by considerations of judicial efficiency and fairness in the long run. In the terms of the intervention Rule, the taxpayer does have a direct "interest relating to the property * * * which is the subject of the [enforcement] action" and there is a real danger that enforcement will "impair or impede his ability to protect that interest."

In contrast, petitioner's interest is not directly in the material sought from Acme and Mercurio, but only in the outcome of the investigation in aid of which the summonses were issued. If—as is common, see pp. 28–29, *infra*—the investigation results in no prosecution, petitioner will not have been harmed by the investigation; even if (as has not been alleged here) the investigation might be attacked as indirectly harassing the taxpayer or impairing his business relationships, that detriment would not arise from enforcement of the summons but rather from the collateral circum-

stances of its issuance and any publicity that the investigation in general might have. Petitioner's objection to enforcement is thus not grounded upon any alleged interest that disclosure as such would invade but rather upon the collateral fact that disclosure in this manner would facilitate an investigation having a general purpose to which he objects. Moreover, petitioner's claim is not essentially that the government may not have the material it seeks, but rather only that it should not be allowed to obtain it in this manner; unlike privileged matter or matter in which the taxpayer has a proprietary interest, the information here in question would not be subject to suppression on any theory if the government found some other means to obtain it—for example through voluntary disclosure by the employer, examination of the employer's own tax returns, or by subpoena at trial. Strictly speaking in the language of the intervention Rule, therefore, petitioner has no "interest" directly "relating to the property or transaction which is the subject of the action."

By the same token, there is nothing that may transpire at the enforcement proceeding that will "as a practical matter impair or impede [petitioner's] ability to protect [his real] interest," granting that the parties to the enforcement proceeding will not assert his claims. To the extent that he has any valid objection to the manner in which the tax investigation is being carried out, that objection can and should properly be asserted in the broader context of the investigation as a whole. If petitioner is prosecuted, he can—

like any other criminal defendant—raise appropriate objections to the manner in which the indictment against him was obtained or, more particularly, object to the use of any evidence obtained by administrative investigative procedures on the ground that those procedures were abused. Compare *United States* v. *Blue,* 384 U.S. 251. There is no need for petitioner to be given an anticipatory power to disrupt an investigation that does not directly invade any of his personal rights.

Since petitioner's claim is based upon the alleged criminal nature of the investigation of his tax liabilities, it is pertinent to compare his position to that of potential criminal defendants generally who are under investigation. A person who is the subject of a criminal investigation has no right to interrupt the investigation except to the extent that his personal rights are invaded. Thus, he cannot suppress the fruits of a search of a third party or a third party's premises, even if that search was illegal and for the purpose of obtaining evidence against him. "The established principle is that suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Alderman* v. *United States,* 394 U.S. 165, 171–172. Petitioner no more has an "interest" that is "impaired" by a third party's disclosure of information about him than would he be "aggrieved" within the meaning of F.R. Crim. P. 41(e) by an illegal search of that third party. Nor does he have any better standing to object

to the enforcement of an internal revenue summons against the third party than he would have to object to a subpoena issued to that party to testify about petitioner's affairs before a grand jury.

3. There is a strong governmental interest in preventing disruptions of internal revenue investigations that are not necessary to the protection of the rights of taxpayers and witnesses

Those cases that have read this Court's decision in *Reisman* v. *Caplin* as sanctioning broad intervention by taxpayers to prevent enforcement of summonses directed to third parties have resulted in marked impairment of the utility of such summonses in tax investigations. Taxpayers now routinely notify summoned witnesses not to divulge information to the Internal Revenue Service and—like petitioner in this case—commonly obtain temporary restraining orders against witnesses who would otherwise cooperate with the government.[8] The result is substantial delay—in many cases as much as two years in the trial court alone[9]—in tax investigations while information grows

[8] Such restraining orders are based upon the Court's suggestion in *Reisman* that such relief against an otherwise cooperative witness is appropriate in order to protect any right that the taxpayer might appropriately assert to prevent disclosure. 375 U.S. at 449–450. See Meldman, *Taxpayers' Efforts to Restrain Third Party Witnesses' Compliance with a Summons*, 46 Taxes 685. Petitioner has followed this route on at least two prior occasions. See *United States* v. *Mothe*, 69–2 U.S.T.C., par. 9612 (E.D. La.); *United States* v. *Learner*, 298 F. Supp. 1104 (S.D. Ill.).

[9] Numerous examples of serious delays can be found even in the reported cases. *Foster* v. *United States*, 265 F. 2d 183 (C.A. 2), certiorari denied, 360 U.S. 912 (one and one-half year delay noted in concurring opinion); *In re Magnus, Mabee and Reynard, Inc.*, 311 F. 2d 12 (C.A. 2), certiorari denied, 373 U.S.

stale and statutes of limitations run. This Court recognized and gave effect to the congressional intent that such investigations not be unnecessarily hampered in *United States* v. *Powell, supra,* 379 U.S. at 54. See also, *e.g., United States* v. *Giordano,* 419 F. 2d 564 (C.A. 8), certiorari denied, April 20, 1970, No. 1219, 1969 Term; *United States* v. *Ryan,* 320 F. 2d 500, 502 (C.A. 6), affirmed, 379 U.S. 61.

II. AN INTERNAL REVENUE SUMMONS MAY PROPERLY BE USED IN AID OF A TAX INVESTIGATION CONDUCTED IN ORDER TO DETERMINE WHETHER A CRIMINAL PROSECUTION SHOULD BE RECOMMENDED

If the Court agrees that petitioner was properly denied intervention to object to enforcement of the summonses directed to Acme and Mercurio that is, of course, the end of this case. If not, we agree with petitioner that the Court should go on to decide the merits of the proposition of law upon which petitioner's proposed answer rests: that an internal revenue summons

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902 (two year delay noted in opinion); *United States* v. *Moriarty*, 70-1 U.S.T.C., par. 9145 (E.D. Wis.), earlier order reported at 278 F. Supp. 187 (E.D. Wis.) (two-year delay between order allowing discovery and order granting summary judgment for government); *United States* v. *Mothe*, 69-2 U.S.T.C., par. 9612 (E.D. La.) (record shows petition for enforcement was filed on November 26, 1968; an appeal from an order of enforcement is now pending befor the Fifth Circuit); *United States* v. *Schoendorf*, 70-1 U.S.T.C., par. 9178 (E.D. Wis.) (record shows petition for enforcement was filed February 3, 1969; an appeal from an order of enforcement is now pending before the Seventh Circuit); *United States* v. *Ahmanson*, 415 F. 2d 785 (C.A. 9) (two and one-half years delay in enforcing summonses).

may not properly be issued under Section 7602 or enforced under Sections 7402 and 7604 when its "primary purpose" is to assist the Internal Revenue Service in deciding whether or not to recommend to the Department of Justice that the taxpayer be criminally prosecuted. The court below held that such a purpose is not an improper one for the use of an internal revenue subpoena, and it should be affirmed.

The functions of intelligence division "special agents" unavoidably involve "ascertaining the correctness of [a] return [or] * * * determining the liability of [a] person for [an] internal revenue tax * * *", and therefore fall precisely within the functions for which internal revenue summonses are authorized by Section 7602. The legislative history clearly contemplates that special agents may use such summonses in aid of their criminal investigatory duties, without requiring any assessment of the relative weight of the civil and criminal elements in any particular investigation. Petitioner's contention amounts to the untenable proposition that the Internal Revenue Service must either forswear a criminal prosecution at the end of its investigation or else conduct that investigation without the aid of the summons procedures that have long been central to the effective administration of the tax laws.

A. THE CIVIL AND CRIMINAL ELEMENTS OF TAX INVESTIGATIONS ARE NECESSARILY INTERTWINED

The Internal Revenue Service is organized to carry out the broad responsibilities of the Secretary of the

Treasury, under Section 7801(a) of the Internal Revenue Code of 1954, to administer and enforce the internal revenue laws. See generally, Internal Revenue Service Organization and Functions, §§ 1112 *et seq.*, 35 Fed. Reg. 2417 *et seq.* A national, seven regional and fifty-eight district offices are appropriately subdivided to handle the specialized aspects of tax law enforcement. In each district an intelligence division and an audit division carry out the district director's responsibility for determining and assessing tax liability and investigating criminal and civil violations of the tax laws (§ 1118.3). The intelligence division (§ 1118.6).

> * * * enforces the criminal statutes applicable to income, estate, gift, employment and excise tax laws (except those relating to alcohol, tobacco, narcotics and certain firearms), by developing information concerning alleged criminal violations thereof, evaluating allegations and indications of such violations to determine investigations to be undertaken, investigating suspected criminal violations of such laws, recommending prosecution when warranted, and measuring effectiveness of the investigation and prosecution processes. * * *

The audit division (§ 1118.4) examines all types of returns

> (1) * * * based on doubt as to liability for taxes or for both taxes and statutory additions * * *. The audit program involves * * * participation with special agents of the In-

> telligence Division in the conduct of tax fraud investigations * * *.[10]

Further coordination is provided by an assistant regional commissioner for intelligence, presiding over a regional intelligence division, who (§ 1114.(10))

> [i]n conformity with intelligence policies, and programs, established by the National Office, * * * develops regional programs, standards and other measures necessary to implement most effectively the intelligence program of the Service *which includes the investigation of alleged tax fraud, certain other civil and alleged criminal violations of tax laws* * * *, and such other special investigations as the Commissioner may direct. * * * [Emphasis added.]

In addition, he supervises the review of special agents' reports of investigation submitted by the district offices in his region and approves or disapproves recommendations for prosecution. Further review of prosecution recommendations and referrals to the Department of Justice are made by the office of regional counsel for each region (§ 1116(3)).

An examination of the above described structure reveals several factors of importance to this case. To begin with, while a special agent of a district office intelligence division will initiate an investigation as a result of some allegation or indication of criminal

[10] In the large districts, a field office branch of the audit division conducts "special field examinations, as requested, including joint examinations with special agents of Intelligence Divisions where tax evasion may exist" (§ 1118.44).

conduct, the ultimate decision to refer the case to the Department of Justice for prosecution is not made until the investigation has been completed and reviewed by the assistant regional commissioner for intelligence and a regional counsel. Secondly, the special agent may well conduct his investigation in conjunction with the district office audit division, which division is charged with uncovering liability for taxes and statutory additions. Finally, the authority of the assistant regional commissioner for intelligence to administer regional intelligence programs addressed to both civil and criminal violations of the tax laws gives assurance that the investigations of the district office intelligence divisions will be utilized as part of a coordinated scheme to uncover both criminal and civil infractions.

Statistics compiled by the Commissioner for the 1969 fiscal year demonstrate the significance of the special agent's role in civil as well as criminal enforcement. 1969 Annual Report of the Commissioner of Internal Revenue, pp. 28–31. As the following table indicates, only slightly over one-half of the full-scale tax fraud investigations by intelligence divisions in 1969 resulted in prosecutions.[11]

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[11] Internal revenue summonses are normally issued only in connection with full scale investigations. Special agents also participate in preliminary screenings and investigations, only a fraction of which later lead to full-scale investigations.

1969 Tax Fraud Investigations by Intelligence Divisions

Type	Number	Deficiencies and penalties	
		Total	Average per case
Full-scale investigations	2,080		
Prosecution recommended [1]	1,049	$83,000,000	$79,000
Prosecution not recommended	1,031	20,000,000	19,000

[1] Of course, not all cases recommended for prosecution by the intelligence divisions are ultimately prosecuted. In 1969, the Office of the Chief Counsel found prosecution not warranted in 127 cases reviewed by it and the Department of Justice declined another 100. All told, 712 prosecutions were instituted in that year.

Thus, even in those cases where no prosecution recommendations were made, very substantial liabilities for tax deficiencies and penalties were uncovered.

B. NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF SECTION 7602 RESTRICTS THE USE OF SUMMONSES IN THE COURSE OF INTERNAL REVENUE SERVICE INVESTIGATIONS

In order to enable the internal revenue agents of the audit divisions and the special agents of the intelligence divisions to perform the necessary investigations to uncover civil and criminal tax law violations, the Secretary has delegated to them, as well as to others, the power to issue summonses under Section 7602 of the Code. Treasury Regulations 301.7602–1(c). This delegation is fully consistent with the language and legislative history of Section 7602.

Section 7602 sanctions the use of summonses to examine books and records and take testimony

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax * * * or collecting any such liability * * *.

Under Section 6659(a)(2) of the Code, the term "tax" includes any additions or penalties assessed in addition to a tax deficiency. When any underpayment of tax is "due to fraud," the taxpayer is not only subject to criminal sanctions under Sections 7201 or 7206 of the Code, but is also liable for a 50 percent penalty under Section 6653(b). Clearly then, the determination of the "liability of any person for any internal revenue tax" necessarily includes an investigation into the possible existence of fraud to determine whether a penalty is included in the total amount of tax liability. The assignment of investigations to special agents of the intelligence divisions where reason exists to suspect fraud merely warrants that the possible criminal aspects of the case will be fully explored; the first, and often the final, step of such assignment is to determine the correct basic tax liability of the person under investigation, apart even from any penalty.

The legislative history of Section 7602 shows that the summons power was derived from Sections 3614 and 3615 (a)–(c) of the Internal Revenue Code of 1939 (see Table II to 1954 Code, 68A Stat. 969) and that these two sections had independent roots in revenue acts dating back to 1919 and 1864, respectively. An understanding of those two sections of the 1939 Code is essential since, in adopting Section 7602, Congress intended "no material change from existing

law." H. Rep. No. 1337, 83d Cong., 2d Sess., p. 436; S. Rep. No. 1622, 83d Cong., 2d Sess., p. 617.[12] The report of the House Ways and Means Committee on the 1954 Code commented in general terms on the revisions of procedural and administrative provisions of the Code (p. 99):

> Your Committee has made a comprehensive revision of the portion of the Internal Revenue Code relating to procedure and administration. The changes represent a substantial simplification of existing provisions. Administrative provisions presently scattered throughout the code have been brought together into a new subtitle. As a result of this reorganization it has been possible to combine a great number of provisions, shortening them and providing more uniform application for the various internal revenue taxes. * * *

For similar statements, see S. Rep. No. 1622, p. 133, and the remarks of Mr. Reed, House manager of the bill, 100 Cong. Rec. 3425.

The "existing law" before the adoption of the 1954 Code appeared in part in Section 3614(a) of the 1939 Code, which provided as follows:

> *To determine liability of the taxpayer.* The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return, where none has been made, is authorized, by any officer or employee of the

[12] As the promulgation of the 1939 Code itself merely codified existing law with no attempt to effect substantive changes, see, *e.g.*, S. Rep. No. 20, 76th Cong., 1st Sess., p. 1, earlier revenue acts must also be consulted to ascertain the meaning of specific provisions of that codification.

> Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

The Commissioner was first given the power to examine records and compel attendance of witnesses and take testimony in 1919 through the enactment of a virtually identical provision. Act of February 24, 1919, c. 18, 40 Stat. 1057, 1142, Sec. 1305.[13] Neither the committee reports nor the congressional debates contain any references to the meaning of the 1919 provision, with the possible exception of a reference by one Congressman to the large appropriations for enforcement contained in the revenue act to enable the Commissioner to prevent tax evasion and investigate returns. 56 Cong. Rec. 10237.

The other half of the "existing law" carried forward in Section 7602 was contained in Section 3615 (a)–(e) of the 1939 Code, which provided in pertinent part:

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[13] The 1919 provision was reenacted several times before becoming part of the 1939 Code. Act of November 23, 1921, c. 136, 42 Stat. 227, 310, Sec. 1308; Act of June 2, 1924, c. 234, 43 Stat. 253, 340, Sec. 1004; Act of February 26, 1926, c. 27, 44 Stat. (Part II) 9, 113, Sec. 1104; Act of May 29, 1928, c. 852, 45 Stat. 791, 878, Sec. 618.

(a) *General authority.* It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogations, under oath, respecting any object or income liable to tax or the returns thereof. * * *

(b) *Acts creating liability.* Such summons may be issued—

* * * * *

(2) *Failure to render return on time.* Whenever any person who is required to deliver a monthly or other return of objects subject to tax fails to do so at the time required, or

(3) *Erroneous, false or fraudulent return.* Whenever any person who is required to deliver a monthly or other return of objects subject to tax delivers any return which, in the opinion of the collector, is erroneous, false, or fraudulent, or contains any undervaluation or understatement, * * *

(c) *Persons liable.* Such summons may be issued to—

(1) *Persons mentioned in subsection (b).* Any person mentioned in subsection (b), or

(2) *Persons having books.* Any other person having possession, custody, or care of books of account containing entries relating to the business of any person mentioned in subsection (b), or

(3) *Other persons.* Any other person the collector may deem proper.

This section closely follows a provision first adopted in 1864, Act of June 30, 1864, c. 173, 13 Stat. 223, 226–227,

Sec. 14,[14] and reenacted several times prior to its codification in 1939.[15] That it sanctions the use of the summons to conduct investigations into criminal conduct can be strongly inferred not only from its own language but also from two related provisions in the 1939 Code. The immediately following section, Section 3616, imposes criminal sanctions upon any person delivering a false or fraudulent return with the intent of evading taxes as well as upon any person failing to appear pursuant to a summons issued under Section 3615. Secondly, Section 3654, in charging the collector with the duty of aiding in the "prevention, detection, and punishment of any frauds in relation" to the collection of revenue, authorizes him to issue summonses and compel compliance therewith "in the same manner as provided in Section 3615."

By combining Sections 3614 and 3615 (a)–(c) into Section 7602 in 1954 without intending to change

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[14] There were no committee reports on the 1864 Act. The debates in the House appear to assume that a summons could be used to obtain evidence of a criminal violation. See, *e.g.*, Cong. Globe, 38th Cong., 1st Sess., pp. 2660–2661, 2996–2997.

[15] Act of July 13, 1866, c. 184, 14 Stat. 101, Sec. 9; Act of December 24, 1872, c. 13, 17 Stat. 401, Sec. 1. In 1873 the provision was codified as part of Section 3173 of the Revised Statutes, which section was amended by Act of March 1, 1879, c. 125, 20 Stat. 327, 330–331, Sec. 3; Act of August 27, 1894, c. 349, 28 Stat. 509, 558–559, Sec. 34; Act of October 3, 1913, c. 16, 38 Stat. 114, 178–179, Sec. II. I (Eye); Act of September 8, 1916, c. 463, 39 Stat. 756, 774, Sec. 16; Act of February 24, 1919, c. 18, 40 Stat. 1057, 1146–1147, Sec. 1317; Act of November 23, 1921, c. 136, 42 Stat. 227, 312, Sec. 1311; Act of June 2, 1924, c. 234, 43 Stat. 253, 345–346, Sec. 1018; Act of February 26, 1926, c. 27, 44 Stat. (Part II) 9, 118, Sec. 1115.

existing law and as part of an effort to "combine a great number of [administrative and procedural] provisions, shortening them and providing more uniform application for the various internal revenue taxes," H. Rep. No. 1337, *supra*, p. 99, Congress clearly sanctioned the use of summonses in investigations into possible criminal conduct.

C. THERE IS NO BASIS IN PRECEDENT OR REASON FOR RESTRICTING THE USE OF INTERNAL REVENUE SUMMONSES IN INVESTIGATIONS PRIOR TO A RECOMMENDATION FOR PROSECUTION

The main thrust of petitioner's claim that a summons cannot be used for the primary purpose of investigating criminal conduct stems from the somewhat ambiguous dictum in *Reisman* v. *Caplin*, 375 U.S. 440, 449 that

> * * * the witness may challenge the summons on any appropriate ground. This would include, as the circuits have held, the defenses that the material is sought for the improper purpose of obtaining *evidence for use in a criminal prosecution, Boren* v. *Tucker*, 239 F. 2d 767, 772–773 * * *. [Emphasis added.]

The present question was, of course, not litigated in *Reisman*. In any event, the reference to *Boren* v. *Tucker* places the statement in proper perspective. The *Boren* court, in affirming a district court's enforcement of a summons issued in furtherance of a tax fraud investigation, discussed at some length the inextricably related possibilities of both civil and criminal penalties in tax fraud cases and the statutory responsibilities of the Secretary to investigate both possibilities. In distinguishing the case of *United*

States v. *O'Connor*, 118 F. Supp. 248 (D. Mass.), it acknowledged that use of the administrative summons solely to aid the prosecution of a pending criminal action by the Department of Justice long after the special agent's investigation and report had been completed would be improper. But in the situation before it, the *Boren* court held the summons proper. This Court's use of the phrase "evidence for use in a criminal prosecution" in *Reisman* can well be read as referring only to the situation that the *Boren* court, in dictum, indicated would be improper. That situation is, of course, not present in this case and the Court need not decide here precisely where the line between a tax investigation and a tax prosecution—in which we are prepared to assume the administrative summons procedure can no longer be used—should be drawn. Certainly there is no tax prosecution under way when, as here, no recommendation has been made by the Internal Revenue Service to the Department of Justice.[16]

[16] The *O'Connor* opinion contains dicta questioning the propriety of compelling the production of evidence which might be used in a subsequent criminal prosecution by any means other than grand jury process. The recent decision of this Court in *United States* v. *Kordel*, 397 U.S. 1, lays that notion to rest, even if Section 7602 is construed to allow the use of summonses in civil investigations only. In *Kordel*, the Court found no infirmity in a conviction for violations of the federal food and drug laws despite the use by the prosecution of evidence secured in good faith through compelled answers to written interrogatories issued in a parallel civil proceeding. 397 U.S. at 11-13. While the *Kordel* opinion goes on to discuss situations where contemporaneous civil and criminal proceedings might be incompatible, none of those situations is presented here.

The courts of appeals in numerous cases following *Reisman* have sanctioned the use of internal revenue summonses in connection with investigations into both criminal and civil liability under the tax laws, *e.g.*, *McGarry* v. *Riley*, 363 F. 2d 421, 424 (C.A. 1), certiorari denied, 385 U.S. 969; *United States* v. *Hayes*, 408 F. 2d 932, 936 (C.A. 7), certiorari denied, 396 U.S. 835; *Wild* v. *United States*, 362 F. 2d 206, 209 (C.A. 9), and in some cases have expressly sanctioned the use of summonses regarded as issued principally to investigate criminal conduct, where no criminal prosecution is actually pending. *United States* v. *DeGrosa*, 405 F. 2d 926, 928 (C.A. 3), certiorari denied *sub nom. Zudick* v. *United States*, 394 U.S. 973; *Venn* v. *United States*, 400 F. 2d 207, 210 (C.A. 5); *United States* v. *Michigan Bell Telephone Co.*, 415 F. 2d 1284, 1286 (C.A. 6); *Howfield, Inc.* v. *United States*, 409 F. 2d 694, 697 (C.A. 9).

As we have shown, there can be no meaningful line drawn between the "civil" and "criminal" purposes of a special agent's investigation, and certainly no determination of the relative weight of such purposes, before the point is reached where an administrative decision has been made to recommend that the Department of Justice institute a criminal prosecution. Until that point—and even after, to the extent that the Service proceeds toward collection of the taxes owned—the purposes described in Section 7602 are necessarily being carried out. A failure to pay taxes when due gives rise to simultaneous civil and criminal

liabilities and, as we have shown, the presence of fraud is pertinent to both. Neither the language nor the legislative history of Section 7602 suggests any distinction between "civil" and "criminal" investigations of tax liabilities, and any effort to engraft such a distinction judicially would, as we have shown, interfere with the congressional purpose.

Effective, and therefore fair, administration of the tax laws requires that internal revenue officers not be fettered in their good faith use of the investigatory tools that Congress has provided them to determine the liabilities of taxpayers. Petitioner's contentions, if accepted, would require those officers, in commencing an investigation where fraud is suspected, to forswear either the potentiality of an ultimate recommendation for prosecution or the use of the summons procedures without which effective investigations cannot ordinarily be carried out. Neither the statute, nor, as this Court recently held in *United States* v. *Kordel*, 397 U.S. 1, 11, the fair administration of justice requires the courts so to "stultify enforcement of federal law".

Accordingly—although this case narrowly involves only a special agent's initial investigation at the district level—we urge the Court to hold, if it reaches the propriety of the summonses, that an internal revenue summons may properly be issued under Section 7602 if it is issued in good faith in aid of an investigation by the Internal Revenue Service prior to a final recommendation for criminal prosecution.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 6653. FAILURE TO PAY TAX

* * * * *

(b) *Fraud.*—If any part of any underpayment (as defined in subsection (c)) of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a).

* * * * *

SEC. 6659. APPLICABLE RULES

(a) *Additions treated as tax.* Except as otherwise provided in this title—

* * * * *

(2) Any reference in this title to "tax" imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter.

* * * * *

SEC. 7402. JURISDICTION OF DISTRICT COURTS.

(a) *To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and orders of injunction, and of *ne exeat republica*, orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be ne-

cessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws.

(b) *To Enforce Summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

* * * * *

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having

possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

* * * * *

SEC. 7801. AUTHORITY OF DEPARTMENT OF THE TREASURY.

(a) *Powers and duties of Secretary.* Except as otherwise provided by law, the administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury.

* * * * *

Federal Rules of Civil Procedure:

RULE 24.

Intervention

(a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

* * * * *

RULE 81.

Applicability in General

(a) *To what proceedings applicable.*

* * * * *

(3) In proceedings under Title 9, U.S.C., relating to arbitration, or under the Act of May 20, 1926, ch. 347, § 9 (44 Stat. 585), U.S.C., Title 45, § 159, relating to boards of arbitration of railway labor disputes, these rules apply only to the extent that matters of procedure are not provided for in those statutes. These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

* * * * *

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

SEC. 301.7602–1 EXAMINATION OF BOOKS AND WITNESSES

* * * * *

(c) *Persons who may issue summons.* The following officers and employees of the Internal Revenue Service are authorized to issue a summons pursuant to sections 6420(e)(2), 6421(f)(2), and 7602—

(1) Regional commissioners and district directors.

(2) Inspection: Assistant Commissioner; director and assistant directors, Internal Secu-

rity Division; regional inspectors; and all internal security inspectors.

(3) Alcohol and Tobacco Tax: Assistant regional commissioners.

(4) Intelligence: Director; assistant director; assistant regional commissioners; executive assistants to assistant regional commissioner; chiefs, Review and Conference Staff; reviewer-conferees; chiefs and assistant chiefs of divisions, branches and sections; group supervisors; and special agents of the national, regional and district officers.

(5) International Operations: Director; assistant director; chiefs of divisions, branches, and groups; special agents; internal revenue agents; estate tax examiners; revenue service representatives; and assistant revenue service representatives.

(6) Collection: Chiefs and assistant chiefs of divisions; chiefs and assistant chiefs of the Delinquent Accounts and Returns Branches; group supervisors; and revenue officers.

(7) Audit: Chiefs of divisions and branches; group supervisors; internal revenue agents; and estate tax examiners.

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